

(27,290)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1919.

No. 535.

CARBON STEEL COMPANY, PETITIONER,

*vs.*

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE  
FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE THIRD CIRCUIT.

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No. 2438 MARCH TERM, 1919.

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**CARBON STEEL COMPANY**, a corporation organized  
and existing under the laws of the State of West  
Virginia,

Plaintiff in Error,

vs.

**C. G. LEWELLYN**, Collector of Internal Revenue for  
the 23rd District of Penna.,

Defendant in Error.

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**TRANSCRIPT OF RECORD**

**In the**  
**DISTRICT COURT OF THE UNITED STATES**  
**For the Western District of Pennsylvania**

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No. 1957 May Term, 1918.

CARBON STEEL COMPANY, a corporation organized  
and existing under the laws of the State of West Virginia,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for  
the 23rd District of Pennsylvania.

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**APPEARANCES:**

H. V. BLAXTER, F. DeC. FAUST,  
Attorneys for Plaintiff.

R. L. CRAWFORD,  
United States Attorney and Attorney for Defendant.

B. B. MCGINNIS,  
Special Assistant United States Attorney and Attorney  
for Defendant.

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Among the rolls, records and judicial proceedings had  
in the District Court of the United States at No. 1957 May  
Term, 1918, may be found the following words and figures,  
to-wit:



**DOCKET ENTRIES.**

February 6, 1918, Praecipe for summons and Plaintiff's Statement filed.

February 6, 1918, Summons in assumpsit issued, returnable to first Monday of March next.

February 7, 1918, Writ returned served on C. G. Lewellyn, Internal Revenue Collector, by handing to and leaving a true and attested copy thereof with C. G. Lewellyn, personally, at Pittsburgh, Pa., February 6, 1918.

March 21, 1918, Praecipe for trial list filed.

March 21, 1918, Affidavit of Defense filed.

June 20, 1918, Continued.

September 23, 1918, Stipulation waiving jury trial filed.

October 7, 1918, Case tried without a jury and argued C. A. V.

October 7, 1918, Plaintiff's witnesses sworn: Joseph A. Dickey, Thomas A. Grubbs, Charles McKnight and Dean R. Wilson. Stipulation of Fact filed. Request of Plaintiff for Findings of Fact and Conclusion of Law filed.

January 14, 1919, Opinion and Order for Judgment filed and entered.

January 14, 1919, Pursuant to order of Court, judgment is hereby entered in favor of the Defendant and against the Plaintiff.

J. WOOD CLARK, Clerk.

February 8, 1919, Plaintiff's Exception to order for judgment noted and bill sealed by the Court and filed and entered.

February 14, 1919, Plaintiff's petition for writ of error and order allowing same filed and entered.

February 14, 1919, Assignments of Error filed.

February 14, 1919, Bonds for costs approved and filed.

February 14, 1919, Bill of Exceptions signed, sealed and allowed and filed and entered.

February 14, 1919, Praecipe re contents of record sur Writ of Error filed.

February 14, 1919, Writ of Error allowed and issued.

February 14, 1919, Citation awarded, issued and service accepted by B. B. McGinnis.

**PRAECIPE FOR SUMMONS.**

Filed February 6, 1918.

To

J. WOOD CLARK, Esq.,  
Clerk.

Issue summons in assumpsit in the above entitled case  
returnable to next return day.

H. V. BLAXTER,  
Attorney for Plaintiff.

February 6th, 1918.

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**STATEMENT OF CLAIM.**

Carbon Steel Company, plaintiff above named, brings this suit against C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, defendant above named, to recover the sum of TWO HUNDRED SEVENTY-ONE THOUSAND SIXTY-TWO AND 62-100 DOLLARS (\$271,062.62), with interest from December 29th, 1917, upon a cause of action whereof the following is a statement.

**FIRST.** Carbon Steel Company is a corporation duly organized and existing under the laws of the State of West Virginia. C. G. Lewellyn is Collector of Internal Revenue for the 23rd District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.

**SECOND:** Carbon Steel Company on the 25th day of June, 1917, after an examination of its books by an agent of the Department of Internal Revenue and pursuant to the request of such agent, made a return, under protest, under Title III of an Act approved September 8th, 1916, known as Munition Manufacturers' Tax, a copy of the said return and protest being hereto attached, made part hereof and marked Exhibit "A."

**THIRD:** Pursuant to the request embodied in said protest attached to the return hereinbefore referred to and appearing as Exhibit "A" herein, a hearing was had before the Deputy Commissioner of Internal Revenue at Washington, D. C., and, thereafter, under date of October 4th, 1917, plaintiff was notified by the Commissioner of Internal Revenue that at an early date it would be assessed for Munition Manufacturers' Tax in the amount of \$271,062.62.

**FOURTH:** Thereafter, under date of October 30th, 1917, the said C. G. Lewellyn, acting under instructions from the Commissioner of Internal Revenue at Washington, D. C., mailed notice and demand for Munition Manufacturers' Tax assessed against the Carbon Steel Company amounting to \$271,062.62.

**FIFTH:** The said notice and demand of the said C. G. Lewellyn, Collector, for the payment of said Munition Manufacturers' Tax recites that if the tax is not paid on or before November 29th, 1917, it would be the duty of the Collector to collect said tax, together with 5% additional and interest at the rate of one per cent a month until paid.

**SIXTH:** That, subsequently, on the 30th day of November, 1917, the said 29th day being a legal holiday, plaintiff filed with the defendant, for presentation to the Commissioner of Internal Revenue, a claim for the abatement of said Munition Manufacturers' Tax amounting to \$271,062.62, a copy of which claim is hereto attached, made part hereof and marked Exhibit "B."

SEVENTH: That, thereafter, plaintiff not having been advised of favorable action upon said claim, and to avoid liability for interest at the rate of one per cent a month, on December 29th, 1917 paid to the said C. G. Lewellyn, Collector, said Munition Manufacturers' Tax as assessed for the period ending December 31st, 1916 in the sum of \$271,062.62 and at the same time filed with the said C. G. Lewellyn a written protest, a copy of which protest is hereto attached, made part hereof and marked Exhibit "C."

EIGHTH: The said tax in the amount of \$271,062.62 was assessed by the said C. G. Lewellyn, Collector, under authority asserted by the said Collector to be given by Section 301 of Title III of the Act of September 8th, 1916, known as Munition Manufacturers' Tax, which provides:

"(1) That every person manufacturing (a) gun-powder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

NINTH: Plaintiff avers that it did not manufacture munitions or any parts thereof, as referred to in Title III, Section 301 of said Act of September 8th, 1916, and that

it is not liable for Munition Manufacturers' Tax as therein imposed.

TENTH: Plaintiff avers that in the year 1915 it entered into three certain contracts with His Britannic Majesty's Government for the supply of 4.5 inch Howitzer shells, fitted with nose bushings and driving bands, which contracts were duly performed by plaintiff.

ELEVENTH: Plaintiff avers that said contracts were duly performed by it in the following manner: Plaintiff in its own plant in the usual course of its business as a manufacturer of steel, manufactured steel bars in mill lengths of suitable material, which steel bars were then delivered to other persons, firms or corporations, all of which persons, firms or corporations were separate from and independent of plaintiff as either employees, agents or subsidiaries, said persons, firms or corporations comprising, among others, the Westinghouse Machine Company, the Union Switch & Signal Company, the Standard Underground Cable Company, the National Sewing Machine Company and the Ellsworth Hardwood Company, and which persons, firms or corporations cut the said steel in bar form to length, converted it into hollow shell forgings, turned said forgings to exact dimension, closed in or formed the nose of the shell, inserted base plates when required, threaded the opening of said shells, inserted transit plugs, fabricated and inserted copper driving bands and varnished, greased and crated said shells and delivered the same to common carriers for transportation and delivery f. a. s. New York. The said work so done by said persons, firms or corporations being all the steps necessary or required from converting a steel bar into a completed shell fitted with nose pieces and driving rings. Upon delivery of said shells by the common carriers f. a. s. New York, plaintiff was paid therefor by His Britannic Majesty's Government, and, in turn, paid all said persons, firms and corporations for the various work done by them in the manufacture of said shells.

**TWELFTH:** In the doing of all said work, as appears by plaintiff's return made under protest, hereto attached and marked Exhibit "A," the net cost of said steel in the bar form was the sum of \$1,316,626.28 and the cost to plaintiff for traveling, miscellaneous expenses and commissions connected with said work was the sum of \$717,457.21, and the cost to plaintiff for procuring the manufacture of said shells by other persons, firms or corporations was the sum of \$4,341,753.06, or a total cost to plaintiff of \$6,375,836.55. Plaintiff upon the delivery of said shells to His Britannic Majesty's Government f. a. s. New York, received in payment therefor \$8,544,337.51 leaving to plaintiff a net profit of \$2,168,500.96 realized from its contracts with His Britannic Majesty's Government for the supply of shells, upon which profit said C. G. Lewellyn, Collector, assessed the tax of  $12\frac{1}{2}\%$ , or \$271,062.62, as above referred to.

**THIRTEENTH:** Plaintiff is advised and believes and therefore avers that there existed no warrant in law for the assessment by the said Commissioner of Internal Revenue of a Munition Manufacturers' Tax against the Carbon Steel Company for the period ending December 31st, 1916 in the amount of \$271,062.62, or in any amount whatsoever, for profits derived from the manufacture of munitions under Section 301 of Title III of the Act of September 8th, 1916 known as the Munition Manufacturers' Tax.

**FOURTEENTH:** That the assessment by the said Commissioner of Internal Revenue upon the plaintiff of \$271,062.62, being a tax of  $12\frac{1}{2}\%$  upon the profit derived by plaintiff from the sale of munitions not manufactured by it, is unlawful and void and the collection thereof from the plaintiff was without authority of law, and that there is therefore due from the defendant to the plaintiff the amount thereof, to-wit, \$271,062.62, with interest from the date of payment, to-wit, December 29th, 1917, for the recovery of which amount plaintiff brings its suit.

H. V. BLAXTER,  
Attorney for Plaintiff.

State of Pennsylvania, }  
County of Allegheny. } ss:

Before me a Notary Public in and for said County and State personally appeared D. R. WILSON, who, being duly sworn according to law, deposes and says that he is the Vice-President of the CARBON STEEL COMPANY, plaintiff above named, and as such is its duly authorized agent in this behalf; that he has a knowledge of the matters herein set forth, and that the averments contained in Plaintiff's statement of claim are true and correct to the best of his knowledge, information and belief.

(Seal)

D. R. WILSON.

Sworn to and subscribed before me this 5th day of February, 1918.

ROSE L. BYERS,

Notary Public

My commission expires March 9th, 1919.

#### EXHIBIT "A"

Pittsburgh, Pa., June 25th, 1917.

C. G. Lewellyn, Esq.,  
Collector of Internal Revenue,  
Pittsburgh, Pa.

Please take notice that the attached return of the Carbon Steel Company under the Statute providing for a tax on manufacturers of munitions, is made under protest, and as a result solely of the demand of the Federal examining officer, and is not to be construed as an admission by the undersigned of any liability for such tax, but solely to avoid any alleged claim on the part of the Government for a penalty; and the undersigned request that, before any assessment be made against it under the said Act, that a hearing be accorded to it before the Commissioner of Internal Revenue; the undersigned hereby claiming that it has not manufactured munitions.

CARBON STEEL COMPANY

(Signed) By W. W. NOBLE

Asst. Treasurer.



## MUNITIONS MANUFACTURERS' TAX.

Assessment List (Month) 191

## THE PENALTY

FOR FAILURE TO HAVE THIS RETURN IN THE HANDS OF THE COLLECTOR OF INTERNAL REVENUE ON OR BEFORE MARCH 1 IS A FINE OF \$10,000 OR IMPRISONMENT NOT EXCEEDING ONE YEAR, OR BOTH, AND AN ADDITIONAL ASSESSMENT OF 50 PER CENT OF THE TAX.

Page Line

## IMPORTANT.

All information on this form should be read carefully before inserting figures.

## RETURN OF ANNUAL NET PROFITS.

(Title III, Act of September 8, 1916)

Exhibit "A"

## RETURN OF NET PROFITS OR INCOME FOR THE CALENDAR YEAR ENDED DECEMBER 31, 19

by CARBON STEEL CO. (Name of person, firm, or corporation.) manufacturing (Article manufactured.)  
and located at Foot of 32nd Street, Pittsburgh, Pennsylvania  
(Number and street.) (City or town.) (State.)

|  |    |          |     |      |
|--|----|----------|-----|------|
| 1. Total amount of capital employed in the business or properties and used in the manufacture of munitions or parts thereof  | \$ |          |     |      |
| 2. Total amount of debt or loans (interest-bearing) contracted to meet the needs of such business  | \$ |          |     |      |
| 3. Gross amount of income received or accrued from the sale or disposition of munitions or parts thereof manufactured in the United States   |    | Dollars. |     | Cts. |
|  |    | 8 544    | 337 | 51   |
| 4. Cost of raw materials entering into the manufacture of such articles or parts   |    | Dollars. |     | Cts. |
| 5. Total amount of expenses of operation and maintenance relating to the business or properties  |    | 1 316    | 626 | 28   |
| 6. Amount of interest paid within the year on debts or loans described in Item 2   |    | 717      | 457 | 21   |
| 7. Taxes of all kinds paid within the year with respect to the business or properties relating to the manufacture of munitions or parts thereof                                    |    | 4 341    | 753 | 06   |
| 8. Losses actually sustained and charged off within the year in connection with the business, and not compensated for by insurance or otherwise                                    |    | none     |     |      |
| 9. Depreciation on property used in, but not specially constructed or installed, in this business  |    | none     |     |      |
| 10. Amount apportioned to the year for amortization of the cost of buildings and machinery specially constructed or installed for use in manufacture of munitions or parts thereof |    | none     |     |      |
| Total deductions, items 4 to 10, inclusive.  |    | 6 375    | 836 | 55   |
| 11. Total net profits upon which tax at 12½ per cent is computed.  | \$ | 2 168    | 500 | 96   |
| 12. Total amount of tax to be assessed.  | \$ |          |     |      |

\* I, or we, D. R. WILSON (Name) and W. W. NOBLE (Name)  
Vice-President and Assistant Treasurer  
(Official position.) (Official position.)

respectively, of CARBON STEEL COMPANY (Name of firm, corporation, or association.)  
whose return of net profits or income from the manufacture and sale or disposition of munitions or parts thereof is hereinbefore set out, being severally duly sworn, each for himself, depose(s) and say(s) that the facts and figures set out in the foregoing report or in any statement attached hereto, are, to his best knowledge and belief, true and correct in each and every item and particular.

Subscribed and sworn to before me this 25th  
day of June, 1917

D. R. WILSON Vice-President  
(Signature) (Official position.)  
W. W. NOBLE Assistant Treasurer  
(Signature) (Official position.)

\* The above oath should be so altered as to read correctly, whether made by one or more individuals, as the case may require.

[SEAL] Ross L. Byers  
Notary Public  
(Official capacity.)

## GENERAL INSTRUCTIONS.

**Person.**—The term "person" as used in these instructions will comprehend every individual, partnership, corporation, or association engaged in manufacturing in the United States any articles or parts thereof enumerated in Section 301, Title III, of the Act of Congress approved September 8, 1916. The tax imposed by this Title is in addition to the income tax imposed by Title I of the same Act, and is an amount equivalent to 12½ per cent upon the entire net profits actually received or accrued for each calendar year from the sale or disposition of such articles named as are manufactured within the United States.

**Any part thereof.**—Any part of any of the articles mentioned in paragraphs (b) to (e), inclusive, of Section 301 as used in the section referred to is an article relatively complete within itself and designed or manufactured for the special purpose of being used as a component part of a munition, and which, by reason of its peculiar characteristics, loses its identity as a stock or commercial commodity, and which without further treatment can not be used for any purpose other than that for which it was designed. (See Art. 13 of Regulations 39.)

**Effective date of Title.**—The effective date of this Title is January 1, 1916, and every person engaged in the manufacture and sale of any of the articles or parts thereof enumerated in Section 301 of this Title is subject to the tax thereby imposed, computed upon the entire net profits received or accrued during the year 1916 and each calendar year thereafter, from the sale or disposition of such articles as are manufactured in the United States.

**Return to be made when.**—Each person coming within the terms of this Title is required to make a return of annual net profits or income in the manner and form prescribed in the foregoing blank, which return, when properly prepared and sworn to, shall be filed with the Collector of Internal Revenue of the District in which such person has his principal office or place of business, on or before March 1 next following the year for which the return is made or in which the net profits were received or accrued. Failure to file the return within the prescribed time subjects the delinquent to a specific penalty of not more than \$10,000 or imprisonment not exceeding one year, or both, and to an assessment of 50 per cent additional tax.

**Signatures and verification.**—The return must be signed and sworn to before an officer qualified to administer an oath, and the seal of such officer, if required to have a seal, must be impressed upon the form in the space provided therefor. If the business is carried on by an individual, the return shall be signed and sworn to by him; if by a partnership, then by two of the members of the firm; if by a corporation or association, then by two of the principal officers of such organization.

**When the tax shall be assessed and paid.**—The tax imposed by this Title shall be assessed by the Commissioner of Internal Revenue as soon as practicable after the receipt of the return, and the taxable person shall be notified of the amount of such tax and the same shall be paid to the Collector of Internal Revenue with whom the return was filed, on or before 30 days from the date of such notice.

**Authority of Commissioner of Internal Revenue.**—The Commissioner of Internal Revenue is authorized by this Title, in person or by an agent, to examine the books of account and records of any person subject to the tax, or who has reason to believe is subject to the tax, for the purpose of verifying any return made, or to make an investigation to determine the amount of profits received and accrued to such person, in case no return is made, and to assess the tax accordingly and proceed to collect the same in the same manner as if a return of the net profits disclosed, had been made.

**Gross income.**—The gross income contemplated by the Title and to be reported in this return is the gross amount received by or accrued to a taxable person during the year from the sale or disposition of such articles named in Section 301 of this Title as are manufactured within the United States, profits received and accrued from the manufacture and sale of blasting powder and dynamite, and from the manufacture of cartridges, loaded and unloaded, caps or primers, used for industrial purposes being excepted, and income received during the year 1916 from the sale and delivery of such articles, under contracts fully performed prior to January 1, 1916, being also excepted from liability to this tax. (See Art. 10, Regulations 39.)

UNITED STATES INTERNAL REVENUE.

CLAIM UNDER SERIES 7, No. 14, FOR REMISSION OF TAXES ABATABLE UNDER SEC. 3220  
OR SEC. 3221, R. S., OR SEC. 6, ACT OF MARCH 1, 1879, AS AMENDED.

State of PENNSYLVANIA

County of ALLEGHENY

} ss:

E X H I B I T "B"

D. R. WILSON

of the ~~over~~ [City] of \* Pittsburgh, and State and County aforesaid,  
being duly SWORN according to law, deposes and says that he is the Treasurer  
of the Carbon Steel Company, which is

~~xxxx~~ engaged in the business of manufacturing iron and steel; that in  
the month of September, A. D. 1917, / ~~xxxx~~ said Carbon Steel Company was  
tax of two hundred seventy-one thousand sixty-two and 50/100 ----- dollars,  
(\$271,062.62) Munition Manufacturers' Tax, List 23, year 1917, month  
September, Folio 12, line 27,  
which assessment of the aforesaid tax should, as this deponent verily believes, be abated ~~xxxxxxx~~ in whole  
for the following reasons, viz:

(1st) The Carbon Steel Company did not manufacture munitions;

(2nd) The munitions manufactured, on which the above tax was  
assessed, were manufactured by other persons, firms and corporations  
than the Carbon Steel Company, which persons, firms and corporations  
were independent contractors and not agents of the Carbon Steel Company;

(3rd) The profit derived by the Carbon Steel Company, to-wit,  
\$2,168,500.96, on which the above tax was assessed, was a profit  
derived from the sale of munitions and not from the manufacture thereof.

And this deponent now claims that, for the reasons above stated, ~~xxx~~ the Carbon Steel Company is  
justly entitled to have \$271,062.62 dollars of the aforesaid assessment remitted,  
and ~~xxx~~ now ask and demand the same.

{ Sworn to and subscribed before me this 30th  
day of NOVEMBER, A. D. 1917. }

D. R. WILSON

PHIL C. MOORE

Notary Public

\* Give post-office address.

† If a member of a firm, state the fact.

‡ State for or upon what the tax was assessed.

§ The party making the claim, and the Deputy Collector certifying to the same, should make oath before a Revenue Officer when possible. When a claim is returned for amendment of the affidavit, the amendment should be sworn to.

N.B.—Claims for remission of assessments against Distillers should give the number of the distillery and the month in which the tax accrued.

**EXHIBIT "C"**

December 29, 1917.

Mr. C. G. Lewellyn, Collector of Internal Revenue,  
Box 51,  
Pittsburgh, Pa.

Dear Sir:—

Please take notice that the payment by the Carbon Steel Company, in the amount of \$271,062.62, under the Statute providing for a tax on manufacturers of munitions, is made under protest and pursuant only to demand of the Federal Government, and is not to be construed as an admission by the undersigned of any liability for such tax; the undersigned hereby claiming that it has not manufactured munitions.

Yours very truly,

**CARBON STEEL COMPANY.**

(Signed) D. R. WILSON

Vice President & Treasurer.

DRW-J

**AFFIDAVIT OF DEFENSE.**

Filed March 21st, 1918.

United States of America,  
Western District of Pennsylvania. } ss:

C. G. Lewellyn, Collector of Internal Revenue for the 23d District of Pennsylvania and defendant above named, being duly sworn according to law, deposes and says that he has a just, full and complete defense to the whole of plaintiff's claim, embodied in the statement filed in this case, the nature and character of which is as follows:

**FIRST TO SEVENTH:** Defendant admits the averment of facts contained in the introductory paragraph and in paragraphs Number First to Seventh, inclusive, in the statement of claim.

**EIGHTH:** Defendant admits the averments contained in the Eighth paragraph of plaintiff's statement of claim, with the exception of the allegation that the said tax in the amount of \$271,062.62 was assessed by the said C. G. Lewellyn, Collector, under authority asserted by the said collector to be given by Section 301 of Title III of the Act of September 8, 1916, known as the Munition Manufacturers' Tax, but on the contrary avers that the said tax in the amount of \$271,062.62 was assessed by the Commissioner of Internal Revenue, Daniel C. Roper, under and pursuant to Section 306 of Title III of the Act of September 8, 1916, known as the Munition Manufacturers' Tax.

**NINTH:** Defendant denies all the allegations contained in the Ninth Paragraph of the plaintiff's statement of claim. Defendant avers on the contrary that the said plaintiff was manufacturing munitions and parts thereof

under the provisions of Title III, Section 301, of the Act of September 8, 1916, and that under and pursuant to the provisions of said Act, the plaintiff was liable for Munition Manufacturers' Tax, as therein imposed upon the sale or disposition, by said plaintiff, of all such articles manufactured within the United States.

TENTH: Defendant admits the averments contained in the Tenth paragraph of plaintiff's statement of claim, but avers that the plaintiff, in the year 1915, entered into three certain contracts with His Britannic Majesty's Government, not only for the supply of 4.5 inch Howitzer shells, fitted with nose bushings and driving bands, but also for the manufacturing of the same.

ELEVENTH: Defendant denies that portion of the Eleventh paragraph of plaintiff's statement of claim which alleges that all of the said persons, firms or corporations which completed the manufacture of said shells were separate from and independent of plaintiff as either employees, agents or subsidiaries, but on the contrary avers that all of said persons, firms or corporations were employees, agents and subsidiaries of the plaintiff and were employed and engaged by the said plaintiff to fashion and work the materials, all of which materials were owned and furnished by said plaintiff, into shells. And defendant further avers that all of said persons, firms or corporations performed said work as employees, agents and subsidiaries under hire of the plaintiff, as well as for the plaintiff.

TWELFTH: Defendant admits the averments contained in the Twelfth paragraph of plaintiff's statement of claim, with the exception of the allegation that the said tax of twelve and one-half per cent was assessed by the said C. G. Lewellyn, Collector, on the said \$2,168,500.96, being the net profit realized from the plaintiff's contracts with His Britannic Majesty's Government for the supply of said shells, but on the contrary avers that said assessment

of said tax was made by the Commissioner of Internal Revenue, Daniel C. Roper, in accordance with the Internal Revenue Laws of the United States.

**THIRTEENTH:** Defendant denies all the allegations contained in the Thirteenth paragraph of the plaintiff's statement of claim.

**FOURTEENTH:** Defendant denies all the allegations contained in the Fourteenth paragraph of the plaintiff's statement of claim.

For further answer to plaintiff's statement of claim, defendant avers that the tax, for recovery of which plaintiff brought this suit, was legally assessed against and collected from the plaintiff under authority of the laws of the United States, particularly the Act of Congress, approved September 8, 1916, 39 Stat.-780, and therefore, the defendant is not indebted to the plaintiff in the sum of \$271,062.62, or any other sum.

Affiant avers that all the facts herein set forth are true.

C. G. LEWELLYN.

Sworn to and subscribed before me this 21st day of March, 1918.

(Seal)

G. L. BERGER,

Deputy Clerk,

United States District Court, Pittsburgh, Pa.

**PRAECIPE FOR TRIAL.**

Filed March 21st, 1918.

J. WOOD CLARK,

Clerk of U. S. District Court.

Place above entitled case on the next trial list.

B. B. MCGINNIS,

Special Assistant United States Attorney and Attorney  
for Defendant.

March 21st, 1918.

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**STIPULATION WAIVING JURY TRIAL.**

Filed September 23rd, 1918.

And now, to-wit, September 23rd, 1918, we, the parties to the above entitled cause, by our attorneys, hereby waive a trial by jury of this case and agree that the issues involved in said cause be tried and determined by the said Court without the intervention of a jury; however, reserving to us and each of us the right to procure a review by appeal or writ of error.

H. V. BLAXTER,  
Attorney for Plaintiff.

B. B. MCGINNIS,  
Attorney for Defendant.

**TRIAL MEMORANDUM.**

Filed October 21st, 1918.

**CARBON STEEL COMPANY**, a corporation  
organized and existing under the laws of the State of West  
Virginia.

vs.

**C. G. LEWELLYN**, Collector of Internal Revenue  
for the 23rd District of Pennsylvania.

No. 1957 May Term, 1918.

Before Hon. Charles P. Orr, Judge, jury trial being  
waived by stipulation.

**WITNESSES:**

Joseph A. Dickey, called on behalf of Plaintiff.

Thomas S. Grubbs, called on behalf of Plaintiff.

Charles McKnight, called on behalf of Plaintiff.

D. R. Wilson, called on behalf of Plaintiff.



**TESTIMONY.**

Filed October 21st, 1918.

And now, to-wit, October 7th, 1918, this case came on to be heard before Hon. Charles P. Orr by stipulation, jury trial having been waived.

**APPEARANCES.**

H. V. BLAXTER, ESQ.,

F. DeC. FAUST, ESQ.,

Washington, D. C.

On behalf of Plaintiff.

B. B. McGINNIS, ESQ.,

Special Assistant United

States Attorney,

On behalf of Defendant.

JOSEPH A. DICKEY, called on behalf of plaintiff, being duly sworn, testified as follows:

**DIRECT EXAMINATION** by Mr. Blaxter:

Q. I believe you were the Assistant Auditor of the Westinghouse Machine Company ?

A. Yes, sir.

Q. The reason I say "were" is that I understand that the Westinghouse Machine Company and the Westinghouse Electric & Manufacturing Company are now merged ?

A. Yes, sir.

Q. And in that merged company, your title is Assistant Plant Auditor, is it ?

A. Works Accountant.

Q. You were familiar with the affairs of the Westinghouse Machine Company before the merger ?

A. Yes, sir.

Q. Will you state whether or not the munition tax heretofore paid by the Westinghouse Machine Company included, for the purpose of computing the tax and paying the same, all profits derived from the contracts hereinbefore referred to with the Carbon Steel Company for forging and machining British 4½ inch, high explosive shells ?

A. Yes, sir.

CROSS EXAMINATION by Mr. McGinnis:

Q. These were the profits that the Westinghouse Machine Company realized from the work they did on these shells ?

A. Yes, sir.

Q. Were they profits realized from the sale of the shells or from the work? Let me put it another way: There was no tax assessed on the profits realized from the sale of these shells ?

A. We didn't sell the shells.

Q. And the profits on which the taxes were assessed were not the profits realized from the sale, but the profits realized by your people from doing the work ?

A. Yes, sir.

Q. Do you know what the profits realized from the sales were ?

A. No, sir.

Mr. Blaxter:—The purpose of this testimony is this: The fifteenth paragraph of our Stipulation of Fact reads as follows: "The Westinghouse Machine Company and the Union Switch & Signal Company were duly assessed and paid a munition manufacturers' tax for the year 1916

upon the net profits realized by said companies for the manufacture of munitions, as defined by said Act approved September 8, 1916;" but the Government said they couldn't stipulate where the profits came from. And I am calling an officer from each company to show that.

THOMAS S. GRUBBS, called on behalf of plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Blaxter:

Q. I believe you are the Secretary of the Union Switch & Signal Company ?

A. Yes, sir.

Q. And have been so for some period of time ?

A. Since July of 1915.

Q. Will you state whether or not the munitions tax heretofore paid by the Union Switch & Signal Company included, for the purpose of computing the tax and paying the same, all profits derived from operations carried on under the contracts with the Carbon Steel Company for forging and machining British 4½-inch, high explosive shells ?

Mr. McGinnis:—For the purpose of making a record, I will make an objection, that it is not material to this case whether the Union Switch & Signal Company paid the taxes on the profits of the work.

Objection overruled and exception noted.

A. Yes, sir.

CROSS EXAMINATION by Mr. McGinnis:

Q. What do you say these taxes were assessed on ?

A. On the work that we did for the Carbon Steel Company in the manufacture of these shells.

Q. Were you assessed on the cost of manufacture or what ?

A. On the difference between what the Carbon Steel Company paid us for the work and our cost in doing it.

Q. Did you make any sale of these munitions ?

Objected to by counsel for plaintiff, as immaterial and as not cross examination.

Mr. McGinnis:—It is the position of the Government that these people had no liability whatever. If they paid a tax that it was not their duty to pay, that has nothing to do with this case. I want the facts all in. I think this is immaterial, but, if the other side wants it in, that is all right.

By the Court:—The objection is raised to the question, "Did you make a sale?" And I think that is asking for a conclusion of the witness, and I will sustain the objection.

Mr. Blaxter:—I might call your Honor's attention to the fact that the Act says, "sale and disposition." It is not limited to the sale.

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CHARLES McKNIGHT, called on behalf of plaintiff,  
being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Blaxter:

Q. You are President of the Carbon Steel Company ?

A. Yes, sir.

Q. And you were the President of the Carbon Steel Company in 1914 ?

A. Yes, sir.

Q. Will you state whether, in the fall of 1914, when you went to Europe, the Carbon Steel Company was making or had ever made or was equipped to make munitions?

A. They were not; they had not; and they were not equipped to make.

Q. Will you state the circumstances under which you procured your first contract?

A. In my own words?

Q. If the Court will permit it, yes.

A. If the Court will remember, in the fall of 1914, the steel business particularly was very bad. In fact, all business was very bad. The Carbon Steel Company was losing money, and it became evident to myself and to the Directors that it was necessary for us to get business in some way. And it was suggested to me by my Directors that I should go abroad and see if I could procure some orders from the English or the French Governments. I sailed, I think, on the 5th day of December, on the "Lusitania," and arrived there, as I recall, on the 12th. Through some private introductions I had, I was introduced, first to the Navy Department, and then to the War Office, and found that they needed some shells very badly. They asked me if I had made shells and I told them we had not, but that we could, I was positive, and were willing to make a trial. I told them, however, that I had promised to go to France, and I thought I had better go there first; which I did; and found the French in chaotic condition, and came back to London. And there I consummated this contract with the British Government for 4½-inch Howitzer shells, with the understanding with them that, if we were able to make 4½-inch shells, 75,000 on the first order, they would give us what they call a following contract. During the negotiations for the sale of these shells, I had to be in constant communication with my employees, or my officers, in America, as to the possibility, in the first place, as to whether we could make the steel, which was a high carbon steel and rather hard to make, and, in the second place, whether they could get sub-contractors to do the work of machining, which we were absolutely unprepared

to do, and which the English Government understood at the time we were not prepared to do. And it was part of the understanding that we were to sub-let this contract to other people.

Mr. McGinnis:—I object to this last statement made by the witness.

By the Court:—You had better state what the substance of the conversation was which led to this understanding.

A. I told them that we were manufacturers of steel, but didn't make shells; that I was willing to undertake the manufacture of the steel and to contract with others for the machining and making of the shells.

By the Court:—Proceed.

A. As outlined by Mr. Blaxter, we finally made a contract with the English War Office for these shells, after I had been assured by my employees that they had covered the machining, purchasing of copper, and so on, for the manufacturing of these shells, through other people. And we closed this contract, if I remember, on January 29, 1915.

Mr. Blaxter:

Q. Following that, did you get these contracts that you had in mind—did you subsequently get them?

A. Yes. We started with the negotiations for the following contracts, I think early in July, with J. P. Morgan & Company, who had then become the agents of the English Government, and finished it in September some time. It took negotiations in New York of about three weeks with J. P. Morgan & Company; and various cablegrams were sent by them to the English War Office and

answers received; in which they were fully informed that this machining work was being done by other firms. And we told them exactly who they were, because they wanted to be satisfied that these people were able to do the work.

Q. Then, altogether, the Carbon Steel Company had three contracts with the British Government?

A. Yes, sir.

Q. One of January 26, 1915; another of September 29, 1915, and one of October 7, 1915?

A. Yes, sir. The first was for seventy-five thousand and the next was for three hundred thousand, with an option of three hundred more, and one of fifteen thousand.

Q. And after this, Mr. McKnight, you then returned to the United States and the work was proceeded with in the way that you have already outlined?

A. Yes. I sailed on the same day that this contract was signed, or the following day, I think, and as soon as I got home—well, they had made these contracts before I got home; but we started the manufacture of shells in the way we have outlined here immediately on my return.

Q. Will you state whether or not the contracts that you have been already referred to between the Carbon Steel Company and the Westinghouse Machine Company and the Union Switch & Signal Company and the National Sewing Machine Company and the Ellsworth Hardwood Company and the Standard Underground Cable Company were carried out in the manner and form provided therein?

A. Yes, absolutely in the manner. There was no change in the contracts. Some of the contractors didn't make all their shells, but there was no change made in the contracts.

Q. Will you state whether there were any verbal or written modifications made by the Carbon Steel Company and consented to by these companies, in these contracts, that were not shown in the ones that I have here?

A. There were not.

Q. Will you state whether or not the Carbon Steel Company had inspectors at the plants of the Westinghouse

Machine Company and the Union Switch & Signal Company during the progress of the work ?

A. They didn't have inspectors, but they had clerks who kept account of the shells shipped each day.

Q. Did these clerks do anything other than keep a record of the production for you ?

A. No, sir.

Q. Did the British Government have its inspectors at these plants ?

A. They had their own inspectors.

Q. All the time ?

A. All the time.

Q. Did the Carbon Steel Company, in any manner, direct the method to be pursued by the Westinghouse Machine Company or the Union Switch & Signal Company, or the persons that were to be employed, or whether the persons they employed should be removed or whether machinery should be removed, or, in general, how they were to do the work under their contract ?

A. No.

This is objected to by counsel for defense, as tending to vary the terms of a written contract, which is already in evidence.

Objection overruled and exception noted to defendant.

#### CROSS EXAMINATION by Mr. McGinnis:

Q. The Carbon Steel Company is what kind of a corporation ?

A. A corporation under the laws of the State of West Virginia.

Q. Is it a manufacturing corporation ?

A. Yes, sir.

Q. You said the business was very bad in 1914 ?

A. Yes.



Q. Do you mean by that that the manufacturing business was bad ?

A. I mean that every business was bad.

Q. And you went to Europe in order to get orders for your company ?

A. Yes, sir.

Q. You went over there in the business interests of your company ?

A. Yes, sir.

Q. And you stated to the British Government that you had not made shells, but could ?

A. Yes, sir.

Q. And you kept in close touch with the remaining officers of the Carbon Steel Company, while you were in Europe completing this contract ?

A. I tried to keep in close touch in the first place, but couldn't make the cable work, and I found that the censor was stopping my cables, until I finally got a pass from Sir Francis Hopwood, of the Navy, and then I kept in very close touch every day.

Q. You stated that there was some talk of sub-contractors doing this work, over there ?

A. Yes, I told them we would have to sub-contract the machining.

Q. Was there any question about that being put in the contract—any discussion about that ?

A. No. The contract was very informal. It was more like a letter signed by the War Office. It was followed, however, by what they call the formal contract about three months later.

Q. Did you ask to have it put in the contract ?

A. No.

Q. Did you state to them at all, over there, that you were not able to manufacture these shells in your own plant ?

A. I didn't tell them that we were not able to manufacture them. I told them that we would manufacture them. But they understood from me, in our conversation, that we didn't do the machining. We manufactured the steel in our own plant, of course.

Q. Do you mean to say that when you left there you left the impression with the British officials that you were not to manufacture these shells?

A. I don't know what impression they got. I only know what I told them. They certainly knew in the second contract, in the large contract—they certainly knew that we were sub-contracting the machining.

Q. I now have the contract Exhibit "A," from which I read, "It is understood that in the event of the Seller being able to manufacture from its present plants more than four hundred twenty-five thousand (425,000) of said shells before June 30, 1916, the Buyer will accept and pay for any such additional shells"—and so on. Do you notice the plural word "plants"? They understood that?

A. The present plants.

Q. Its present plants?

A. Its present plants, yes.

Q. Was that discussed when you were discussing these other matters?

A. Certainly. I discussed it with Mr. Stitinius, who was the agent of Morgan, who asked who was going to do our machining, and I told him.

Q. In line 62 of the contract, Exhibit "A," it says, "All shells, in excess of," and so on, "shall be delivered," and so on—.

A. "All shells, in excess of said 425,000 shells, which the Seller may manufacture under the above permission, shall be delivered by the Seller not later than June 30, 1916." Is that what you want?

Q. Yes.

A. What do you want me to answer as to that?

Q. Did you bring it to the attention of the other party to the contract that you were not able to manufacture the shells when that clause was inserted?

A. I insist that you don't use the word "able." They distinctly understood that we were — — — —.

Q. I want my question answered directly.

(Question read).

A. Yes.

Q. Beginning with line 86, it says, "In the event of the Seller's failure to have delivered or to have manufactured, complete and ready for final inspection"—and so on—when that clause was inserted, did you state to them that you were going to have this manufacturing done in other plants?

A. Yes. The contract was all made at the same time, and the conditions were all understood at the time the contract was signed.

Q. Line 195: "The obligations of the Seller hereunder are subject to strikes, floods, fires, explosions, riots, etc." It was all in the same contract?

A. "Contingencies: The obligations of the Seller"—Is that what you mean?

Q. Yes.

A. Well, are you asking the same question that you asked before?

Q. Yes.

A. I would say yes.

Q. I call your attention to line 157: "Upon written notice from the Buyer of its inability to provide oversea transportation, the Seller agrees to store at its works, and at its expense."

A. Line 159 on this contract it says, "Storage: Upon written notice from the Buyer of its inability to provide oversea transportation, the Seller agrees to store at its works, and at its expense, but at the Buyer's risk"—you ask the same question then, whether that was in and they understood it?

Q. Yes.

A. Yes.

Q. You have stated that as soon as you returned you began to manufacture?

A. Yes, sir.

Q. What do you mean by that?

A. Well, we rolled the steel and turned it over to the William Todd Company to do the forging and to the

Westinghouse Machine Company to do the machining, and to the other people to do the other work, whatever it was.

Q. Did you keep in close touch with the completion of the manufacture of these shells from the time you got back until they were delivered ?

A. Oh, yes.

Q. And you had clerks, you have stated, at these plants?

A. Well, not at all of them; I think we had a clerk at the Westinghouse Machine Company, and the Union Switch & Signal Company; we had one at each place, I think, and perhaps sometimes, when the work was very heavy, we had an extra one out there, because they got to making as high as 10,000 of these shells a day.

Q. And they kept track of the production ?

A. Yes. They reported every day to our office the shells manufactured and the shells in course of production.

Q. Now, the steel bars you manufactured in the Carbon Steel Company Plant, did you retain title to those in all stages of the manufacture ?

Objected to by counsel for plaintiff, as asking for a conclusion.

Objection sustained.

Q. Did you sell the steel manufactured by the Carbon Steel Company to any one other than the British Government ?

Objected to by counsel for plaintiff, for the same reason.

Objection sustained.

Q. Were all the materials used in the completed shells the property of the Carbon Steel Company ?

Mr. Blaxter:—That is objected to, as simply framing the question in another way, and still calling for a legal conclusion.

By the Court:—The objection is sustained. Ask him the facts. In other words, ask him this: If they paid the Machine Company for anything except the labor put upon the metal?

Mr. McGinnis:—But that doesn't show who owns the material all the way through. And that is very material.

By the Court:—Doesn't it appear in the Stipulation that it belonged to the Carbon Steel Company?

Mr. McGinnis:—No, it doesn't.

(An extract was here read from the Stipulation) by Mr. Blaxter; who added that, in drawing the Stipulation, he stated everything he could without giving a legal conclusion, and that he believes it a question for the Court to say where the title was.)

Mr. McGinnis:

Q. Then the Carbon Steel furnished all the materials used in the manufacture of these shells to the sub-contractors?

A. Yes, they furnished all the materials except the crates, I think; and, under this contract, they were to crate them and ship them. We didn't buy the crates. I think all the other materials we bought them and furnished them.

Q. And without charge?

A. Bought them without charge? We furnished them without charge, yes, under the terms of the contract.

Mr. Blaxter:

Q. Mr. McKnight, Mr. McGinnis called your attention in a number of places to various lines of the contract with the British Government where the word "manufacture" was used, and the word "plants" was used. As a further question, I would like to call your attention to that paragraph, if you have it before you, headed "Inspection," which comes at about line 135, and ask you to say whether or not there was any reason why that sentence was put in the paragraph reading thus: "It is understood and agreed that the Buyer" — — — —

A. "— shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivery, and that the Seller, or its sub-contractors, shall furnish all facilities required by such inspectors for this purpose. The Seller, at its expense, shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for and their component parts, including all gauges required by the inspectors"—what was your question?

Q. My question was whether that was put in as the result of the British Government, through Morgan, knowing of the proposed sub-contracting of these shells?

A. Yes, sir.

Q. Now, I want to ask you whether you furnished a bond to the British Government for these contracts.

A. Yes, sir.

Q. Did the bond set forth who the sub-contractors were?

A. Yes, sir.

Mr. McGinnis:—I think the bond is part of the exhibits.

By the Court:—Well, it is clear that the British Government knew that the work was being done by

sub-contractors, because they had their inspectors at the different plants, under the evidence.

Mr. Blaxter:

Q. Mr. McGinnis called your attention to that part of the contract providing that the shells should be stored. During the course of this work, were any shells stored, in any periods of time?

A. I don't believe there was. I can't remember exactly. There was a time when there was no overseas transportation, but I think they were kept on the dock waiting for a steamer to come in, but we had nothing to do with that.

Q. But were any shells stored in the plant of the Union Switch & Signal Company?

A. No, I think not.

Q. Were any shells stored by the Carbon Steel Company?

A. No.

Q. Did the shells, after they were completed and crated by the Westinghouse Machine Company and the Union Switch & Signal Company, come back to the plant of the Carbon Steel Company?

A. No, sir.

Q. They were, then, shipped direct by those companies to New York?

A. Yes, sir.

Mr. McGinnis:

Q. Beginning with line 133 of Exhibit "A," it is said, "It is understood and agreed that the Buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured." You have stated that it was clearly understood that these factories were not your factories but their factories?

A. They were both, both our mill and the other factories.

Q. In the next paragraph it says, "The shells hereby contracted for are subject to factory inspection and shop tests at the works of the Seller." Do you still state that reference to the works above was not the works of the Seller?

A. Certainly I do.

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DEAN R. WILSON, called on behalf of plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Blaxter:

Q. You are the Vice-President and Treasurer of the Carbon Steel Company?

A. Yes, sir.

Q. Will you kindly state why, in this return made under protest, attached to the Statement of Claim as Exhibit "A," line one was left blank?

A. It was left blank because there was no capital of the Carbon Steel Company employed in the manufacture of the shells.

This is objected to by counsel for defense, as stating a conclusion.

By the Court:—Well, he prepared that and left it blank, and he is giving the reason why. On cross examination you may break him down; but I think it is proper for him to give his reason.

Mr. Blaxter:

Q. Why was line two left blank?

A. This asks for the debts or loans of the Carbon Steel Company to meet the needs of this business. The



Carbon Steel Company had no debts or loans in connection with the manufacture of the shells.

Q. Why were Lines 6 to 10 left blank, providing for the taxes paid, losses incurred, and the amortization of the cost of buildings used in the work of the manufacture of munitions ?

A. For the same reasons before stated.

Q. Well, state those reasons.

A. Line 6 asks for the amount of interest paid within the year. The line was left blank because there was no interest paid by the Carbon Steel Company. There were no taxes paid by the Carbon Steel Company on this work. There were no losses actually sustained on this work. There was no depreciation on the property used in the manufacture of the shells. There was no amortization charge on the cost of buildings and machinery, because the Carbon Steel Company had no buildings and machinery used in the manufacture of the shells.

Q. Will you state why you interlined a number, 5½ opposite which you put the figures four million, three hundred forty-one thousand and some odd dollars. First, tell us what that sum represents thus interlined.

A. This report was made up at the suggestion of the Examiner for the Government, who came out to our office and showed me the report, with the request to have it prepared. When I explained to him the method used in the manufacture of the shells, and inasmuch as there was no question or provision in this blank which covered our case, if my recollection serves me correctly, he suggested that we should interline or add another line and fill in the amount representing the total cost of the materials which we had purchased outside and used in the manufacture of the shells.

Q. That line, then, shows the total amount paid to your sub-contractors for work done by them ?

A. It does.

## CROSS EXAMINATION by Mr. McGinnis:

Q. As I understand, there was no capital employed in the business of manufacturing these munitions?

A. Yes, sir.

Q. You bought the steel, didn't you—you purchased the steel used?

A. We manufactured the steel.

Q. Did you manufacture the steel out of your own stock?

A. Yes, sir.

Q. You purchased all the remaining parts used in the manufacture of the shells, did you not?

A. Yes, sir.

Q. And the steel bars were cut to lengths in the shops of the Carbon Steel Company, to shell lengths?

Mr. Blaxter:—Just a minute. The testimony is already in as to how that was done, and Mr. Wilson is the Treasurer of the Company, and I don't think this is proper cross examination of this witness. The testimony shows that they were nicked or partially cut by Brown & Zortman, and then the Carbon Steel Company broke them.

Mr. McGinnis:

Q. But the raw material, or the steel used in these shells, was manufactured in the plant of the Carbon Steel Company?

A. The steel was manufactured.

Q. Do you mean to say that no capital was used in the manufacture of that steel?

A. Not to my knowledge.

Mr. Blaxter:

Q. Let me understand you—no capital of the Carbon Steel Company. Where did the money come from?

A. The money had been advanced by the British Government to enable us to buy the materials that went into the manufacture of the shells.

Mr. McGinnis:

Q. Then you used money that was advanced by the British Government as capital to finance these operations?

A. Yes, sir.

Q. Then do you regard that this money that you used that had been advanced by the British Government was not the money of the Carbon Steel Company, and therefore not capital?

Objected to by counsel for plaintiff.

By the Court:—What difference does it make as to what the witness regarded it? The objection is sustained.

Counsel for the plaintiff make the following offers:

Exhibit "A" attached to the Plaintiff's Statement of Claim, being a copy of the return, to which is attached a copy of the protest filed with said return.

Exhibit "B" attached to Plaintiff's Statement of Claim, being a copy of plaintiff's claim for refund of said tax.

Exhibit "C" attached to Plaintiff's Statement of Claim, being copy of protest filed with the Collector of Internal Revenue on December 29, 1917, at the time said tax was paid.

Counsel for plaintiff also offer in evidence Stipulation of Facts agreed to between counsel for plaintiff and defendant.

Also contract between the Carbon Steel Company and His Britannic Majesty's Government dated January 26, 1915.

Also a contract between the Carbon Steel Company and His Britannic Majesty's Government dated September 29, 1915.

Also contract between Carbon Steel Company and His Britannic Majesty's Government dated October 7, 1915.

Also contract between the Carbon Steel Company and the Westinghouse Machine Company dated October 18, 1915.

Also contract between the Carbon Steel Company and the Westinghouse Machine Company dated October 18, 1915.

Also contract between the Carbon Steel Company and the Union Switch & Signal Company dated October 18, 1915.

Also contract between the Carbon Steel Company and the National Sewing Machine Company dated December 27, 1915.

Also contract between the Carbon Steel Company and the Ellsworth Hardware Company dated November 20, 1915.

Also contract between the Carbon Steel Company and the Standard Underground Cable Company dated September 23, 1915.

It is understood and agreed that the originals of the foregoing agreements may be withdrawn and typewritten copies substituted therefor.

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PLAINTIFF RESTS.

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Government offers no testimony.

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TESTIMONY CLOSED.

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CERTIFICATE.

I HEREBY CERTIFY that the foregoing pages contain a correct transcript of all the evidence taken in the hearing in the case of the CARBON STEEL COMPANY, a corporation organized and existing under the laws of the State of West Virginia, vs. C. G. LEWELLYN, Collector of Internal Revenue for the 23d District of Pennsylvania, at No. 1957 May Term, 1918; together with the offers of counsel, the objections thereto and the rulings of the Court thereon.

LUCY DORSEY IAMS,

Official Reporter.

Pittsburgh, Pa., October 18, 1918.

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CERTIFICATE.

I, CHARLES P. ORR, Judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto and rulings of the Court thereon, in the case of CARBON STEEL COMPANY, a corporation, vs. C. G. LEWELLYN Collector of Internal Revenue for the 23d District of Pennsylvania, at No. 1957 May Term, 1918; all of which, so certified, is ordered to be filed and to become part of the record this 21st day of October, 1918.

CHAS. P. ORR,

Trial Judge.

## EXHIBITS

Contracts S-8005. (1. A)

AGREEMENT made between His Britannic Majesty's Secretary of State for War (hereinafter referred to as the Secretary of State) and the Carbon Steel Company of Pittsburgh, U. S. A. (hereinafter referred to as the Contractor) relative to the manufacture of 4.5" Lyddite Shells.

(1) The Secretary of State agrees to place an order with the contractor and the contractor agrees to manufacture 75,000 (seventy-five thousand) 4.5" shells Lyddite, in accordance with specifications and drawings supplied or to be supplied by the Secretary of State to Messrs. Grace Brothers & Company Limited of 144, Leadenhall Street, London, E. C. the London Agents of the contractor. Lyddite shell (not basic steel) to be used in the manufacture of the shell.

(2) The price for each shell to be \$22.20 (twenty two dollars and twenty cents) United States currency, suitably packed for export and delivered free alongside steamer New York.

(3) The contractor undertakes to supply f. a. s. New York 20 (twenty) samples of the shell to be delivered under the contract, within six weeks of the receipt by him of the specifications and drawings. If after inspection and testing of such samples at the Royal Arsenal, Woolwich, they are found to be in accordance with the specification the contractor shall be instructed to proceed immediately with the manufacture of the above mentioned 75,000 shells.

(4) Delivery of the shell to be made f. a. s. New York as follows:

|                              |   |   |   |   |   |                               |
|------------------------------|---|---|---|---|---|-------------------------------|
| 500 shells per week 3 weeks) |   |   |   |   |   |                               |
| 1,000                        | " | " | " | 5 | " | )after acceptance of samples. |
| 2,000                        | " | " | " | 8 | " |                               |

and to continue at the rate of 2,000 shells per week or more, until the total quantity is delivered, the whole order being completed not later than 44 weeks after acceptance of samples. The Contractor will use his best endeavors to reduce the period as much as possible.

(5) The Secretary of State reserves to himself the right to refuse to accept any shell which may not have been presented for inspection before the expiration of the above mentioned 44 weeks and to cancel this agreement so far as regards any such shell.

(6) Inspection will be carried out at the contractor's works by an Inspector or Inspectors appointed by the Secretary of State.

(7) Payment is to be made as follows:

(a) The sum of \$416,250 (four hundred and sixteen thousand two hundred and fifty dollars) United States currency, to be paid by the Secretary of State to the credit of the Contractor at his Bankers in New York at the time that the Contractor is instructed to proceed with the manufacture of the shells after the approval of the samples by Chief Inspector, Royal Arsenal, Woolwich.

(b) Three-fourths of the contract price of the Shell to be paid against delivery of shipping documents for each parcel of approved shells delivered f. a. s. New York.

(c) Should the contractor fail to deliver within the stipulated time approved shell to the value of the amounts issued to him under clause 7A and B, he shall immediately on the termination of the contract refund to the Secretary of State the difference between the value of the shell delivered and approved and the amounts issued under clause 7A and B, together with interest at 5% per annum from the date of termination of the Contract.

(8) A formal contract containing the usual conditions of British War Department contracts for shells and identify-

ing the specifications with which the shells are to comply and such other documents as may be required to give effect to this agreement shall be entered into by the parties in such form as may be required by the Secretary of State.

For and on behalf of the Secretary of State for War.

(Signed) PHILIP HANSON

Acting Assistant Secretary of Army Contracts.

26 Jan., 1915.

CARBON STEEL COMPANY

by Charles McKnight, Prest.



1 AGREEMENT dated the 29th day of September, 1915,  
2 between HIS BRITANNIC MAJESTY'S GOVERNMENT (Hereinafter  
3 called the "Buyer") and CARBON STEEL COMPANY, a corporation  
4 of the State of West Virginia, with an office at Pittsburgh,  
5 Pennsylvania, United States of America (Hereinafter called  
6 the "Seller"), WITNESSETH:

7 That the parties hereto have agreed and do agree  
8 as follows: That the Buyer has contracted to purchase  
9 from the Seller and the Seller has contracted to sell to  
10 the Buyer, at the price and upon and subject to the terms  
11 and conditions following, viz.:

12 **Article:** Shells, Q. F., high explosive, 4.5-inch, Howitzer,  
13 Mark V—L—

14 **Specifications:** Said shells shall conform to the British War  
15 Office General Specification No.  $\frac{L}{3472}$  E and Particular  
16 Specification No.  $\frac{L}{3500}$  and to Royal Laboratory Drawing  
17 No. 22125 (1), dated August 19, 1915, which specifications  
18 and drawing are attached hereto and hereby made a part  
19 hereof.

20 The Buyer, at its option, may elect to have said  
21 shells manufactured in accordance with the new design for  
22 such type of shell, the price per shell to be that herein-  
23 after specified, unless an additional cost of manufacture  
24 is involved by the use of such new design, in which case  
25 the price shall be agreed upon at the time the Buyer exer-  
26 cises said option. In the event of the Buyer exercising  
27 said option, the Buyer shall furnish promptly to the Seller  
28 specifications and drawing for such new design of shell,  
29 which specifications and drawing shall then be deemed to be  
30 a part hereof.

31 **Quantity:** Four hundred and twenty-five thousand (425,000)  
32 such shells.

33 It is understood that in the event of the Seller  
34 being able to manufacture from its present plants more than  
35 four hundred and twenty-five thousand (425,000) of said  
36 shells before June 30, 1916, the Buyer will accept and pay  
37 for any such additional shells up to one hundred and seventy-  
38 five thousand (175,000) in number which the Seller may deliv-  
39 er before June 30, 1916, the purchase of any such additional  
40 shells to be subject to the terms and conditions herein  
41 contained.

42 **Price:** Fourteen and 25-100 dollars (\$14.25) for each such  
43 shell.

44 **Packages:** The shells shall be packed for export by the  
45 Seller, without cost to the Buyer, in accordance with said  
46 general specification and the directions of the Buyer, and  
47 in a manner which shall reasonably assure the transporta-  
48 tion of the shells undamaged to point of destination. The  
49 packages in which the shells are shipped shall become the  
50 property of the Buyer.

51 **Time of Delivery:** The Seller agrees to make deliveries of  
52 said four hundred and twenty-five thousand (425,000) shells  
53 as follows: Ten thousand (10,000) shells during October,  
54 1915; fifteen thousand (15,000) shells during November, 1915;  
55 twenty-five thousand (25,000) shells during December, 1915;  
56 fifty thousand (50,000) shells during January, 1916; and  
57 sixty-five thousand (65,000) shells during each of the  
58 months of February, March, April, May and June, 1916, it be-  
59 ing understood and agreed that delivery of all said four  
60 hundred and twenty-five thousand (425,000) shells shall be  
61 completed not later than June 30, 1916.

62 All shells in excess of said four hundred and twenty-  
63 five thousand (425,000) shells which the Seller may manu-  
64 facture under the above permission shall be delivered by the  
65 Seller not later than June 30, 1916.

66 Time is of the essence of this agreement, and in  
67 the event of the Seller's failure to have delivered, or to

68 have manufactured, complete and ready for final inspection,  
69 the quantity of shells required by the above schedule of  
70 deliveries to be delivered during any three (3) months' per-  
71 iod, beginning October 1, 1915, the Buyer at its option  
72 may refuse to accept and pay for such part of the shells  
73 so required to be delivered in any such period of three (3)  
74 months which the Seller shall fail to have delivered, or to  
75 have manufactured, complete and ready for final inspection  
76 at the end of such three (3) months' period. The exer-  
77 cise of any such right of cancellation by the Buyer shall  
78 not affect the respective obligations of the Seller and of  
79 the Buyer hereunder to deliver and receive subsequent in-  
80 stallments of shells. The failure of the Buyer to exercise  
81 such right of cancellation covering delayed deliveries in  
82 any such three (3) months' period shall not be construed  
83 as a waiver of the Buyer's said right of cancellation cover-  
84 ing delayed deliveries in any subsequent three (3) months'  
85 period.

86 In the event of the Seller's failure to have de-  
87 livered or to have manufactured, complete and ready for  
88 final inspection, the entire quantity of shells hereby con-  
89 tracted for (less such cancellations as may have been made  
90 under foregoing provisions) by June 30, 1916, the Buyer at  
91 its option may refuse to accept and pay for all of said  
92 shells which the Seller so fails to have delivered, or to  
93 have manufactured, complete and ready for final inspection,  
94 by June 30, 1916.

95 The Seller shall have the right to anticipate and  
96 increase the monthly deliveries above specified. Deliveries  
97 made by the Seller in advance of the dates or in excess of  
98 the quantities specified in the above schedule may be credit-  
99 ed upon subsequent deliveries.

100 **Mode of Delivery:** All shells hereby contracted for shall  
101 be delivered by the Seller free alongside ocean steamer,  
102 New York Harbor.

**103 Terms of Payment:** Fifty per cent. (50%) of the purchase  
104 price of each particular lot of shells shall be paid by the  
105 Buyer to the Seller within ten (10) days after presentation  
106 to the Buyer, at the office of Messrs. J. P. Morgan & Co.,  
107 23 Wall Street, New York City, of proper invoices and certi-  
108 ficates of inspection, executed by an inspector of the Buyer,  
109 certifying that such shells have been manufactured and have  
110 passed all factory inspection and shop tests with respect  
111 thereto. The remaining fifty per cent. (50%) of the pur-  
112 chase price of any such lot of shells shall be paid by the  
113 Buyer to the Seller within ten (10) days after presentation  
114 to the Buyer, as aforesaid, of proper invoices and shipping  
115 documents showing delivery of such lot of shells free along-  
116 side ocean steamer, New York Harbor, accompanied by a satis-  
117 factory bond as hereinafter provided.

118 It is understood and agreed that the Seller may make  
119 deliveries of shells and receive payment of said remaining  
120 fifty per cent. (50%) of the purchase price with respect  
121 thereto in advance of receipt of notice of the results of  
122 the firing tests of such shells, but only after presentation  
123 to the Buyer of a bond, satisfactory to the agents of the Buy-  
124 er executing this agreement on the Buyer's behalf, guarantee-  
125 ing the obligation of the Seller, herein contained, that the  
126 Seller will promptly repay to the Buyer the amount of the  
127 purchase price paid with respect to shells which are  
128 rejected upon firing tests made within sixty (60) days  
129 from date of shipment of such shells from the United States.  
130 Acceptance or rejection of such lot of shells shall not be  
131 prejudiced by any such payment, except that in case such  
132 firing tests are not made within sixty (60) days from date  
133 of shipment of such shells from the United States, such  
134 shells shall be deemed to have been accepted by the Buyer.

**135 Inspection:** It is understood and agreed that the Buyer  
136 shall have the right of having one or more inspectors at  
137 each of the factories where the shells hereby contracted  
138 for and their component parts are being manufactured, for  
139 the purpose of observing the manufacture thereof and of  
140 testing the same at any time before delivery, and that the

141 Seller, or its sub-contractors, shall furnish all facil-  
142 ities required by such inspectors for this purpose. The  
143 Seller, at its expense, shall furnish all gauges, includ-  
144 ing master gauges, to be used in connection with the manu-  
145 facture of the shells hereby contracted for and their com-  
146 ponent parts, including all gauges required by the inspectors  
147 of the Buyer.

148 The shells hereby contracted for are subject to  
149 factory inspection and shop tests at the works of the Seller,  
150 and to firing tests to be made within sixty (60) days from  
151 date of shipment of such shells from the United States.

152 The Seller hereby agrees to repay promptly to the  
153 Buyer the amount of all payments made with respect to shells  
154 which are rejected upon said firing tests made within such  
155 sixty (60) days' period.

156 **Delays:** Delays caused by the Buyer, such as failure to pro-  
157 vide inspectors, shall correspondingly extend the time of  
158 delivery above specified.

159 **Storage:** Upon written notice from the Buyer of its in-  
160 ability to provide oversea transportation, the Seller agrees  
161 to store at its works and at its expense, but at the Buyer's  
162 risk, for a period of thirty (30) days all shells contracted  
163 for hereunder which have been finally inspected by an in-  
164 spector of the Buyer and are ready for delivery hereunder.  
165 Shells so stored shall be deemed delivered when so stored,  
166 and shall be paid for accordingly within ten (10) days  
167 after presentation to the Buyer, as aforesaid, of proper  
168 invoices and said certificates of inspection. Such pay-  
169 ment, however, shall not be construed as a waiver of the  
170 obligation of the Seller to deliver the shells, so stored,  
171 free alongside ocean steamer New York Harbor.

172 **Conditions:** It is understood and agreed that if by reason  
173 of an embargo the shells hereby contracted for cannot be  
174 exported from the United States, or in the event of the

175 cessation of hostilities or the termination of the war  
176 before the delivery of the shells hereby contracted for  
177 has been completed, the Buyer at its option may terminate  
178 this agreement, but in the case of the cessation of hos-  
179 tilities or the termination of the war only after ninety  
180 (90) days from date of written notice to the Seller of the  
181 Buyer's intention so to terminate this agreement. In the  
182 event of any such termination the Seller shall be entitled  
183 to receive the unpaid purchase price of any shells actually  
184 manufactured and accepted or ready for acceptance at the  
185 date of termination of this agreement, and in addition there-  
186 to a sum sufficient to cover the actual net expenditures  
187 and outstanding obligations of the Seller for materials,  
188 machinery, labor and supplies incurred with respect to the  
189 portion of the order the delivery of which is so cancelled,  
190 and also similar obligations of the Seller to its sub-  
191 contractors for such materials, machinery and supplies,  
192 and all other actual net expenditures and outstanding ob-  
193 ligations of the Seller made with respect to the portion  
194 of the order the delivery of which is so cancelled.

195 **Contingencies:** The obligations of the Seller hereunder  
196 are subject to strikes, floods, fires, explosions, riots,  
197 etc., preventing performance of such obligations. This  
198 provision, however, shall not be construed to modify or  
199 limit the rights above given to the Buyer in the paragraph  
200 entitled "Time of Delivery" to refuse to accept and pay for  
201 shells not delivered in the quantities and at the times  
202 stated in said paragraph, except that in the event of the  
203 Seller being unable to deliver sixty-five thousand (65,000)  
204 shells during June, 1916, as required by said schedule of  
205 deliveries, because of one of the contingencies above named,  
206 the Seller shall be permitted to deliver said sixty-five  
207 thousand (65,000) shells on or before July 31, 1916.

208 **Option for Further Purchase:** The Buyer shall have the  
209 option, to be exercised by the Buyer not later than May  
210 1, 1916, to purchase from the Seller hereunder an addition-  
211 al three hundred and ninety thousand (390,000) such shells,

212 such additional shells to be delivered by the Seller, at  
213 the rate of at least sixty-five thousand (65,000) shells  
214 per month, immediately after the completion of the delivery  
215 of the four hundred and twenty-five thousand (425,000)  
216 shells hereby contracted for, but prior to December 31,  
217 1916. The purchase of any such additional shells shall  
218 be subject to all the terms and conditions herein  
219 contained, except that the above named price is subject to  
220 such modification thereof as may be necessary in order to  
221 cover advances or declines in the then prevailing cost  
222 of raw materials and labor, any such modification to be  
223 agreed upon at the time of the exercise of said option.

224 THIS AGREEMENT is executed in duplicate as of  
225 the day and year first above written.

226 HIS BRITANNIC MAJESTY'S GOVERNMENT  
227 By J. P. MORGAN & CO.  
228 Agents.

229 CARBON STEEL COMPANY,  
230 By CHARLES McKNIGHT  
231 President.

1 AGREEMENT dated the 7th day of October, 1915,  
2 between HIS BRITANNIC MAJESTY'S GOVERNMENT (Hereinafter  
3 called the "Buyer") and CARBON STEEL COMPANY, a corporation  
4 of the State of West Virginia, with an office at Pittsburgh,  
5 Pennsylvania, United States of America (hereinafter called  
6 the "Seller"), WITNESSETH:

7 That the parties hereto have agreed and do agree  
8 as follows: That the Buyer has contracted to purchase from  
9 the Seller and the Seller has contracted to sell to the  
10 Buyer, at the price and upon and subject to the terms and  
11 conditions following, viz.:

12 **Article:** Shells, Q. F., high explosive, 4.5-inch, Howitzer.

13 **Specifications:** Said shells shall be identical with the  
14 shells now being manufactured by the Seller under the con-  
15 tract between the parties hereto, dated January 20, 1915,  
16 known as Contract S-8005. The specifications and drawings  
17 applicable to said Contract S-8005 shall be deemed to be a  
18 part of this agreement.

19 **Quantity:** Fifteen thousand (15,000) such shells.

20 **Price:** Seventeen dollars (\$17.00) for each such shell.

21 **Packages:** The shells shall be packed for export by the  
22 Seller, without cost to the Buyer, in accordance with said  
23 specifications and the directions of the Buyer, and in a  
24 manner which shall reasonably assure the transportation of  
25 the shells undamaged to point of destination. The packages  
26 in which the shells are shipped shall become the property of  
27 the Buyer.

28 **Time of Delivery:** The Seller agrees to deliver said fifteen  
29 thousand (15,000) shells not later than December 15, 1915.

30 Time is of the essence of this agreement, and in the  
31 event of the Seller's failure to have delivered, or to have  
32 manufactured, complete and ready for final inspection, all



33 of the shells hereby contracted for by December 15, 1915,  
34 the Buyer at its option may refuse to accept and pay for such  
35 part of said fifteen thousand (15,000) shells as the Seller  
36 shall so fail to have delivered, or to have manufactured,  
37 complete and ready for final inspection by December 15, 1915.

38 It is understood and agreed that the shells hereby  
39 contracted for are in addition to the seventy-five thousand  
40 (75,000) shells covered by said contract between the parties  
41 hereto, dated January 20, 1915, known as Contract S-8005.

42 **Mode of Delivery:** All shells hereby contracted for shall  
43 be delivered by the Seller free alongside ocean steamer,  
44 New York Harbor.

45 **Terms of Payment:** Fifty per cent. (50%) of the purchase  
46 price of each particular lot of shells shall be paid by the  
47 Buyer to the Seller within ten (10) days after presentation  
48 to the Buyer, at the offices of Messrs. J. P. Morgan & Co.,  
49 23 Wall Street, New York City, of proper invoices and certi-  
50 ficates of inspection, executed by an inspector of the Buyer,  
51 certifying that such shells have been manufactured and have  
52 passed all factory inspection and shop tests with respect  
53 thereto. The remaining fifty per cent. (50%) of the pur-  
54 chase price of any such lot of shells shall be paid by the  
55 Buyer to the Seller within ten (10) days after presentation  
56 to the Buyer, as aforesaid, of proper invoices and shipping  
57 documents showing delivery of such lot of shells free along-  
58 side ocean steamer, New York Harbor, accompanied by a satis-  
59 factory bond as hereinafter provided.

60 It is understood and agreed that the Seller may make  
61 deliveries of shells and receive payment of said remaining  
62 fifty per cent. (50%) of the purchase price with respect  
63 thereto in advance of receipt of notice of the results of  
64 the firing tests of such shells, but only after presentation  
65 to the Buyer of a bond, satisfactory to the agents of the  
66 Buyer executing this agreement on the Buyer's behalf, guar-  
67 anteeing the obligation of the Seller, herein contained,  
68 that the Seller will promptly repay to the Buyer the amount  
69 of the purchase price paid with respect to shells which are

70 rejected upon firing tests made within sixty (60) days from  
71 date of shipment of such shells from the United States.

72 Acceptance or rejection of such lot of shells shall not be  
73 prejudiced by any such payment, except that in case such  
74 firing tests are not made within sixty (60) days from date  
75 of shipment of such shells from the United States, such  
76 shells shall be deemed to have been accepted by the Buyer.

77 **Inspection:** It is understood and agreed that the Buyer  
78 shall have the right of having one or more inspectors at  
79 each of the factories where the shells hereby contracted for  
80 and their component parts are being manufactured, for the pur-  
81 pose of observing the manufacture thereof and of testing the  
82 same at any time before delivery, and that the Seller, or its  
83 sub-contractors, shall furnish all facilities required by such  
84 inspectors for this purpose. The Seller, at its expense,  
85 shall furnish all gauges, including master gauges, to be used  
86 in connection with the manufacture of the shells hereby con-  
87 tracted for and their component parts, including all gauges  
88 required by the inspectors of the Buyer.

89 All shells hereby contracted for are subject to  
90 factory inspection and shop tests at the works of the Seller,  
91 and to firing tests to be made within sixty (60) days from  
92 date of shipment of such shells from the United States.

93 The Seller hereby agrees to repay promptly to the  
94 Buyer the amount of all payments made with respect to shells  
95 which are rejected upon said firing tests made within such  
96 sixty days' (60) period.

97 **Delays:** Delays caused by the Buyer, such as failure to pro-  
98 vide inspectors, shall correspondingly extend the times of  
99 delivery above specified.

100 **Storage:** Upon written notice from the Buyer of its inability  
101 to provide oversea transportation, the Seller agrees to store  
102 at its works and at its expense, but at the Buyer's risk, for  
103 a period of thirty (30) days all shells contracted for here-  
104 under which have been finally inspected by an inspector of  
105 the Buyer and are ready for delivery hereunder. Shells so

106 stored shall be deemed delivered when so stored, and shall be  
107 paid for accordingly within ten (10) days after presentation  
108 to the Buyer, as aforesaid, of proper invoices and said certifi-  
109 cates of inspection. Such payment, however, shall not be  
110 construed as a waiver of the obligation of the Seller to de-  
111 liver the shells, so stored, free alongside ocean steamer  
112 New York Harbor.

113 **Conditions:** It is understood and agreed that if by reason  
114 of an embargo the shells hereby contracted for cannot be  
115 exported from the United States, the Buyer at its option may  
116 terminate this agreement, but in such event the Seller shall  
117 be entitled to receive the unpaid purchase price of any shells  
118 then actually manufactured and accepted or ready for accept-  
119 ance, and in addition thereto a sum sufficient to cover the  
120 actual net expenditures and outstanding obligations of the  
121 Seller for materials, machinery, labor and supplies incurred  
122 with respect to the portion of the order the delivery of which  
123 is so cancelled, and also similar obligations of the Seller  
124 to its sub-contractors for such materials, machinery and sup-  
125 plies, and all other actual net expenditures and outstanding  
126 obligations of the Seller made with respect to the portion  
127 of the order the delivery of which is so cancelled.

128 **Contingencies:** The obligations of the Seller hereunder are  
129 subject to strikes, fires, floods, explosions, riots, etc.,  
130 preventing performance of such obligations. This provision,  
131 however, shall not be construed to modify or limit the right  
132 above given to the Buyer in the paragraph entitled "Time of  
133 Delivery" to refuse to accept and pay for any shells not  
134 delivered, or manufactured, complete and ready for final  
135 inspection by December 15, 1915.

136 **THIS AGREEMENT** is executed in duplicate as of the  
137 day and year first above written.

138 **HIS BRITANNIC MAJESTY'S GOVERNMENT,**  
139 **By J. P. MORGAN & CO.**  
140 **Agents**

141 **CARBON STEEL COMPANY,**  
142 **By CHARLES McKNIGHT,**  
143 **President**

**EXHIBITS.**  

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**SUB-CONTRACTS.****FORGING.**

CARBON STEEL COMPANY and  
WESTINGHOUSE MACHINE COMPANY.

**MACHINING.**

CARBON STEEL COMPANY and  
WESTINGHOUSE MACHINE COMPANY.

**MACHINING**

CARBON STEEL COMPANY and  
UNION SWITCH & SIGNAL COMPANY.

**FIXING SCREWS.**

CARBON STEEL COMPANY and  
NATIONAL SEWING MACHINE COMPANY.

**WOODEN PLUGS.**

CARBON STEEL COMPANY and  
ELLSWORTH HARDWOOD COMPANY.

**COPPER TUBING.**

CARBON STEEL COMPANY and  
STANDARD UNDERGROUND CABLE COMPANY.

AGREEMENT made this 18th day of October, 1915, but to take effect and become operative as of the 29th day of September, 1915, between the CARBON STEEL COMPANY, a corporation of the State of West Virginia, of Pittsburgh, Pa., (hereinafter called the Steel Company), and the WESTINGHOUSE MACHINE COMPANY, a corporation of the State of Pennsylvania, of East Pittsburgh, Pa., (hereinafter called the MACHINE COMPANY), WITNESSETH:

WHEREAS the Steel Company has entered into a contract with His Britannic Majesty's Government under date of September 29, 1915, for the supply of 4.5" high explosive shells in accordance with specifications and R. L. Drawing 22125 (1), attached hereto and made a part hereof

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, it is agreed between the parties hereto as follows: That the Steel Company will pay to the Machine Company for forging and annealing, and the Machine Company will forge and anneal for the Steel Company hollow shell forgings at the prices and upon and subject to the terms and conditions hereinafter recited.

The Steel Company agrees to furnish without charge to the Machine Company f. o. b. cars Machine Company's works, East Pittsburgh, Pa., in the necessary quantities from time to time for carrying out this contract, steel billets approved by the inspectors of the British War Office, which the Machine Company shall manufacture into hollow shell forgings of the dimensions as shown on the attached blue print, for which work of forging and annealing the Steel Company will pay the Machine Company, and the Machine Company will accept the price of one dollar and twenty-five cents (\$1.25) each delivered to the Steel Company f. o. b. cars Machine Company's works, East Pittsburgh, Pa.

The Machine Company agrees to complete said forgings ready for delivery in the following amounts:

|                     |                |
|---------------------|----------------|
| November, 1915..... | 27,000         |
| December, 1915..... | 38,000         |
| January, 1916.....  | 60,000         |
| February, 1916..... | 85,000         |
| March, 1916.....    | 100,000        |
| April, 1916.....    | 100,000        |
| May, 1916.....      | 100,000        |
| June, 1916.....     | 90,000         |
| <b>TOTAL.....</b>   | <b>600,000</b> |

Should the Machine Company in carrying out this contract spoil or lose any steel furnished by the Steel Company, the Steel Company is to be reimbursed by the Machine Company for the same at the rate of three cents (3c) per pound, based upon weights delivered to the Machine Company. All scrap resulting from steel so paid for by the Machine Company shall become the property of the Machine Company. If, after forgings are made, the steel is found to be defective through no fault of the Machine Company, and is so verified by the Steel Company, which shall be done daily, then the material for such forgings is to be promptly replaced by the Steel Company free of charge, and the Machine Company is to be promptly paid for such forgings at the price of one dollar and twenty-five cents (\$1.25) each. In such event, such defective forging is to be the property of the Steel Company.

**Terms of Payment:** The Machine Company will present to the Steel Company at its office in Pittsburgh, Pa., certificates of inspection approved by the British inspector of the number of shells forged during the preceding week. The Steel Company agrees to make payment for such forgings, as evidenced by such inspection certificates forty-five (45) days after delivery, as provided herein, based on weekly shipments.

**Inspection:** It is understood and agreed that the said hollow shell forgings shall be subject at all times in the process of making to the inspection of the authorized representatives or inspectors of the Steel Company and the English War Office, and shall be subject to the approval of the inspectors or representatives of the Steel Company as being in conformity with said specifications. The Machine Company is to furnish free of charge all necessary facilities and materials for such inspection, including master gauges and templets, the Steel Company agreeing, however, to save harmless the Machine Company from any or all loss, damage or expense to which the Machine Co. shall be liable by reason of any injury or accident to any such inspector or representative of the Steel Company.

Time is of the essence of this agreement, and in the event of the failure of the Machine Company to make deliveries or to have completed for final inspection the quantity of forgings required by the above schedule during any one month's period beginning January 1, 1916, except for causes beyond its control, as hereinafter provided, in addition to all other remedies for breach of contract, of which time is of the essence, the Steel Company may, at its option, cancel and turn over to other contractors so much of the work herein contracted for as may be in excess of the demonstrated capacity of the Machine Company. The Machine Company shall have the right to anticipate and increase, subject to the approval of the Steel Company, the monthly deliveries above specified. Deliveries made by the Machine Company in advance of the dates or in excess of the quantities specified in the above schedule shall be credited upon subsequent deliveries.

**Contingencies:** It is understood and agreed that the Machine Company is not to be held responsible or liable for any loss, damage, detention or delay caused by fires, strikes, floods, civil or military authority, by insurrection or riot, or for any other causes beyond its reasonable

control, except that such causes shall not affect the right of the Steel Company, as hereinbefore set forth, to cancel, in case of failure of the Machine Company to make deliveries as hereinbefore provided.

**Delays:** Delays caused by His Britannic Majesty's Government or the Steel Company, such as failure of His Britannic Majesty's Government to provide inspectors or the failure of the Steel Company to furnish the Steel, shall correspondingly extend the time of delivery herein specified.

**Reports:** The Machine Company agrees to furnish to the Steel Company whenever requested so to do detailed reports of the material received, used, spoiled, rejected and on hand, and the progress made in the manufacture and shipment of the forgings herein provided for.

THIS AGREEMENT is executed in duplicate as of the day and year first above written by the several parties hereto by and through their officers duly authorized thereunto.

Attest:

CARBON STEEL COMPANY

W. W. NOBLE

By CHARLES McKNIGHT, Pt.

(Seal)

Attest:

WESTINGHOUSE MACHINE COMPANY

C. W. MCGHEE  
Asst. Secy.

By H. T. HERR

Vice Prest.

(Seal)



Carbon Steel Company,  
Foot of 32nd Street,  
Pittsburgh, Pa.

Dear Sirs:

Supplementing the contract entered into between us dated October 18, 1915, construing the recitals and covenants thereof, it is understood that the Westinghouse Machine Company is to perform forging and annealing steel billets in accordance with the specifications attached to the said contract, or in accordance with specifications changed to meet the changed specifications of his Britannic Majesty's Government; provided, however, that the work to be done upon such billets to cause them to conform to the changed specifications, shall be without any greater cost of labor or manufacture to the Westinghouse Machine Company, and that in case of increase of cost, the parties to the Agreement are to negotiate and agree upon such additional cost.

It is further understood that in the event of the cancellation of the contract held by the Carbon Steel Company with His Britannic Majesty's Government, dated September 29, 1915, for any causes set forth in the paragraph and entitled "Conditions," the Carbon Steel Company shall have the right to cancel this contract between us upon the same terms as to notice and assumption of obligations as therein set forth, payment of such obligations by the Carbon Steel Company to the undersigned, however, to be limited to the amount received from his Britannic Majesty's Government by the Carbon Steel Company for that purpose, on receipt of same.

Yours very truly,

WESTINGHOUSE MACHINE COMPANY

(Signed) H. T. HERR,

Vice President.

We hereby accept and approve the same.

CARBON STEEL COMPANY,

(Signed) CHARLES McKNIGHT, President

Pittsburgh, Pa., October 18, 1915.

AGREEMENT dated this 18th day of October, 1915, but to take effect and become operative as of the 29th day of September, 1915, between the CARBON STEEL COMPANY, a corporation of the State of West Virginia, of Pittsburgh, Pa., (hereinafter called the STEEL COMPANY) and the Westinghouse Machine Company a corporation of the State of Pennsylvania, of East Pittsburgh, Pa., (hereinafter called the MACHINE COMPANY), WITNESSETH:

THAT WHEREAS, the Steel Company has entered into a contract with His Britannic Majesty's Government under date of September 29, 1915, for the supply of 4.5" high explosive shells, as per approved and final copy of contract including specifications and drawings attached hereto and made a part hereof as fully as if recited herein, the provisions of which shall apply in all respects between the parties hereto except where specifically modified hereby.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, it is agreed between the parties hereto as follows: That the Steel Company will pay to the Machine Company for the performance of certain work, and the Machine Company as sub-contractor will perform such certain work for the Steel Company on certain shells and accessories at the price and subject to the terms and conditions following, viz.:

**Article:** Shells, Q. F., high explosive, 4.5" Howitzer, Mark V—L.

**Specifications:** Said shell shall conform to British War Office General Specifications No.  $\frac{L}{3472}$  E. and Particular Specifications No.  $\frac{L}{3500}$  and to Royal Laboratory Drawing No. 22125 (1), dated August 19, 1915.

**Raw Material:** The Steel Company agrees to furnish free of charge to the Machine Company f. o. b. cars latter's works, East Pittsburgh, Pa., in the necessary quantities

for the Machine Company to machine and deliver shells as herein provided prior to July 1, 1916 the following materials, viz.: shell forgings, base plate forgings, copper firing bands, varnish, cement and transit plugs, and steel bars in mill lengths for nose bushings, if required, all in accordance with said specifications.

It is understood and agreed that the deliveries scheduled herein are based on the Steel Company delivering the foregoing f. o. b. cars Machine Company's works, East Pittsburgh, Pa., in reasonable time to permit the Machine Company to perform the work and make the deliveries as herein provided.

**Price:** Six dollars and sixty cents (\$6.60) for the work necessary to complete each shell for delivery.

**Packages:** The shells shall be packed for export by the Machine Company at its own expense.

**Time of Delivery:** The Machine Company agrees, subject to the conditions herein recited, to make deliveries of two hundred twelve thousand five hundred (212,500) shells as follows:

|                     |        |
|---------------------|--------|
| October, 1915.....  | 5,000  |
| November, 1915..... | 10,000 |
| December, 1915..... | 20,000 |
| January, 1916.....  | 25,400 |
| February, 1916..... | 30,400 |
| March, 1916.....    | 30,400 |
| April, 1916.....    | 30,400 |
| May, 1916.....      | 30,450 |
| June, 1916.....     | 30,450 |

---

TOTAL.....212,500

The Machine Company agrees to make deliveries of additional eighty-seven thousand five hundred (87,500) shells as follows:

|           |           |        |
|-----------|-----------|--------|
| January,  | 1916..... | 14,600 |
| February, | 1916..... | 14,600 |
| March,    | 1916..... | 14,600 |
| April,    | 1916..... | 14,600 |
| May,      | 1916..... | 14,600 |
| June,     | 1916..... | 14,500 |

TOTAL..... 87,500

Time is of the essence of this agreement, and in the event of the Machine Company's failure to make deliveries or to have manufactured for final inspection the quantity of shells required by the above schedule during any one month's period beginning January 1, 1916, except for causes beyond its control, as hereinafter provided, in addition to other remedies for breach of contract, of which time is of the essence, the Steel Company may, at its option cancel and turn over to other contractors so much of the work herein contracted for as may be in excess of the demonstrated capacity of the Machine Company.

The Machine Company shall have the right to anticipate and increase the monthly deliveries above specified. Deliveries made by the Machine Company in advance of the dates, or in excess of the quantities specified in the above schedules shall be credited upon subsequent deliveries.

**Delivery:** All shells hereby contracted for shall be delivered by the Machine Company f. o. b. cars Machine Company's works, East Pittsburgh, Pa.

**Terms of Payment:** All payments made by the Steel Company to the Machine Company shall be made ten (10) days after the Steel Company receives payment from the

English Government, that is, the Steel Company will pay fifty per cent. (50%) for each lot ten (10) days after it receives its first payment on account, and the remaining fifty per cent. (50%) ten (10) days after it receives the final payment for each lot of shells delivered f. a. s. New York.

**Inspection:** It is understood and agreed that His Britannic Majesty's Government and the Steel Company shall have the right of having inspectors or representatives where the work herein provided for is being done, and the Machine Company, or its sub-contractors, shall furnish all facilities required by such inspectors or representatives. The Machine Company at its expense shall furnish all gauges, including master gauges, and templets to be used in connection with the manufacture of the shells hereby contracted for.

The Steel Company agrees to save harmless the Machine Company from any and all loss, damage or expense of whatsoever kind and nature for which the Machine Company may be liable by reason of any injury or accident to any inspector or representative of the Steel Company.

**Storage:** Upon written notice from the Steel Company of its inability to provide transportation, the Machine Company agrees to store at its works and at its expense, but at the Steel Company's risk, for a period of sixty (60) days, all shells contracted for hereunder which have been finally inspected by an inspector of His Britannic Majesty's Government, and are ready for delivery. Shells so stored shall be deemed delivered when so stored and shall be paid for according to provisions hereof with respect to time of payment. Such payment, however, shall not be construed as a waiver of the obligations of the Machine Company to deliver these shells so stored to the Steel Company f. o. b. cars Machine Company's works, East Pittsburgh, Pa. After the expiration of sixty (60) days the Steel Company agrees to remove same.

**Contingencies:** It is understood and agreed that the Machine Company is not to be held responsible or liable for any loss, damage, detention or delay caused by fires, strikes, floods, civil or military authority, by insurrection or riot, or for any other causes beyond its reasonable control, except that such cause shall not affect the right of the Steel Company as hereinbefore set forth, to cancel, in case of failure of the Machine Company to make deliveries as hereinbefore provided.

**Scrap:** All scrap necessarily resulting shall become the property of the Machine Company, but if the Machine Company shall spoil or lose any materials furnished by the Steel Company, then the Steel Company is to be reimbursed for such materials as follows: Steel for nose bushings, three (3) cents a pound; all other materials at Steel Company's net cost, based upon weights and quantities delivered f. o. b. cars Machine Company's works. In case the Machine Company should spoil or lose hollow shell forgings, base plate forgings, or copper bands, the Steel Company is to be reimbursed for the same as follows: Hollow shell forgings, three dollars and fifty cents (\$3.50) each; base plate forgings, twelve cents (12c) each; copper bands, fifty cents (50c) each. All of said materials, if the Steel Company is reimbursed as herein provided, shall become the property of the Machine Company.

**Defective Material:** The Steel Company agrees that if any material furnished by it is rejected or proved defective by the Machine Company, and is so verified by the Steel Company, which shall be done daily, such material shall be promptly replaced by the Steel Company free of all cost, upon the request of the Machine Company, the Steel Company agreeing to promptly reimburse the Machine Company for the cost of any machine work done on such

defective material in accordance with the following schedules:

|   |        |
|---|--------|
| 1. Rough face base.....   | \$ .09 |
| 2. Drill center.....  | .13    |
| 3. Cut off open end.....  | .21    |
| 4. Rough turn outside diameter to 4 540".<br>True up base face. Finish turn base<br>end for a distance of 1½" from end.<br>Turn 1050" radius on base end..... | .61    |
| 5. Bore and face open end.....  | 1.15   |
| 6. Chamfer open end.....  | 1.25   |
| 7. Close in open end.....   | 1.33   |
| 8. Bore, finish face and tap nose end.....  | 1.61   |
| 9. Size, tap and insert nose bush.....  |        |
| 10. Finish turn outside diameter.....   | 2.11   |
| 11. Weigh and mark amount to be removed   |        |
| 12. Face to weight, counterbore and tap for<br>base plate.....  | 2.45   |
| 13. Check the weight.....   | 2.47   |
| 14. Hand tap for base plate, notch wave ribs<br>and unscrew nose bush.....  | 2.55   |
| 15. Cut groove and wave ribs.....   | 2.75   |

Provided, always, that no more work is done than is actually required to disclose that the material furnished by the Steel Company is defective. Such defective material shall remain the property of the Steel Company and be subject to its instructions for disposition at the Steel Company's expense.

**Bond:** The Machine Company agrees to join in a bond to his Britannic Majesty's Government as one of two sureties with the Steel Company as principal, and to become responsible to the Steel Company and to the British War Office for the replacement of such shells found defective by the British War Office by reason of defective work of the Machine Company, or for the refunding of any money which the Machine Company may have received

for such shells so rejected, all matters of rejection and methods of replacement being subject to said British War Office specifications; the Steel Company hereby agreeing to indemnify and save harmless the Machine Company for any liability resulting in said bond, excepting for that caused by defective work done by the Machine Company.

**Firing Tests:** It is mutually understood and agreed between the parties hereto that in view of the fact that the aforementioned contract with his Britannic Majesty's Government provides for a test by firing one shell out of every one hundred twenty-one (121) shells delivered, for which shells so used the Steel Company does not receive payment, the Machine Company will not make any charge for any work done by it upon the actual number of such shells so used by the British War Office for firing test. It is further agreed that the Machine Company shall not charge or receive payment for any work done upon any shells or parts of shells which may be used for test purposes under the process of manufacture or before final acceptance and shipment from its works.

The Machine Company agrees to furnish to the Steel Company, whenever requested so to do, detailed reports of the materials received, used, spoiled, rejected and on hand, and the progress made in the manufacture and shipment of the shells herein provided for.

THIS AGREEMENT is executed in duplicate as of the day and year first above written by the several parties hereto by and through their officers duly authorized thereunto.

Attest:

CARBON STEEL COMPANY

W. W. NOBLE

By CHARLES MCKNIGHT

(Seal)

Pt.

Attest:

WESTINGHOUSE MACHINE COMPANY

C. W. MCGHEE

By H. T. HERR

Asst. Secy.

Vice Prest.

(Seal)



East Pittsburgh, Pa., October 18th, 1915.

Carbon Steel Company,  
Foot of 32nd St.,  
Pittsburgh, Pa.

Dear Sirs:

In construing the recitals and covenants of the contract between us, dated October 18th, 1915, it is understood that the incorporation of your contract with His Britannic Majesty's Government, by reference therein, confers no obligation on you to place further orders with us in the event of the exercise of "Option for Further Purchases," therein conferred by His Britannic Majesty's Government, and that in the event of the cancellation of such contract by His Britannic Majesty's Government for any of the causes set forth in the paragraph entitled "Conditions," you shall have the right to cancel this contract between us upon the same terms as to notice and assumption of obligations as therein set forth, payment of such obligations by you to us, however, to be limited to the amounts received from His Britannic Majesty's Government by you for that purpose on receipt of same.

Yours very truly,

WESTINGHOUSE MACHINE COMPANY

H. T. HERR

Vice President

We hereby accept and approve the same.

CARBON STEEL COMPANY

CHARLES McKNIGHT  
President.

AGREEMENT dated this 18th day of October, 1915, but to take effect and become operative as of the 29th day of September, 1915, between the CARBON STEEL COMPANY, a corporation of the State of West Virginia, of Pittsburgh, Pa., (hereinafter called the STEEL COMPANY) and the UNION SWITCH & SIGNAL COMPANY, a corporation of the State of Pennsylvania, of Swissvale, Pa., (hereinafter called the SWITCH COMPANY), WITNESSETH:

THAT WHEREAS the Steel Company has entered into a contract with His Britannic Majesty's Government under date of September 29th, 1915, for the supply of 4.5" high explosive shells, as per approved and final copy of contract including specifications and drawings attached hereto and made a part hereof as fully as if recited herein, the provisions of which shall apply in all respects between the parties hereto except where specifically modified hereby.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, it is agreed between the parties hereto as follows: That the Steel Company will pay to the Switch Company for the performance of certain work, and the Switch Company as sub-contractor will perform such certain work for the Steel Company on certain shells and accessories at the price and subject to the terms and conditions following, viz.:

**Article:** Shells, Q. F., high explosive, 4.5" Howitzer, Mark V-L.

**Specifications:** Said shell shall conform to British War Office General Specifications No.  $\frac{L}{3472}$  E. and Particular specifications No.  $\frac{L}{3500}$  and to Royal Laboratory Drawing No. 22125(1), dated August 19, 1915.

**Raw Material:** The Steel Company agrees to furnish free of charge to the Switch Company f. o. b. cars latter's works, Swissvale, Pa., in the necessary quantities for the Switch

Company to machine and deliver shells as herein provided prior to July 1, 1916, the following materials, viz.: shell forgings, base plate forgings, copper firing bands, varnish, cement and transit plugs, and steel bars in mill lengths for nose bushings, if required, all in accordance with said specifications.

It is understood and agreed that the deliveries scheduled herein are based on the Steel Company delivering the aforegoing f. o. b. cars Switch Company's works, Swissvale, Pa., in reasonable time to permit the Switch Company to perform the work and make the deliveries as herein provided.

**Price:** Six dollars and sixty cents (\$6.60) for the work necessary to complete each shell for delivery.

**Packages:** The shells shall be packed for export by the Switch Company at its own expense.

**Time of Delivery:** The Switch Company agrees, subject to the conditions herein recited, to make deliveries of two hundred twelve thousand five hundred (212,500) shells as follows:

|                     |        |
|---------------------|--------|
| October, 1915.....  | 5,000  |
| November, 1915..... | 10,000 |
| December, 1915..... | 20,000 |
| January, 1916.....  | 25,400 |
| February, 1916..... | 30,400 |
| March, 1916.....    | 30,400 |
| April, 1916.....    | 30,400 |
| May, 1916.....      | 30,450 |
| June, 1916.....     | 30,450 |

---

**TOTAL.....**212,500

The Switch Company agrees to make deliveries of additional eighty-seven thousand five hundred (87,500) shells as follows:

|                     |               |
|---------------------|---------------|
| January, 1916.....  | 14,600        |
| February, 1916..... | 14,600        |
| March, 1916.....    | 14,600        |
| April, 1916.....    | 14,600        |
| May, 1916.....      | 14,600        |
| June, 1916.....     | 14,500        |
| <b>TOTAL.....</b>   | <b>87,500</b> |

Time is of the essence of this agreement, and in the event of the Switch Company's failure to make deliveries or to have manufactured for final inspection the quantity of shells required by the above schedule during any one month's period beginning January 1, 1916, except for causes beyond its control, as hereinafter provided, in addition to other remedies for breach of contract, of which time is of the essence, the Steel Company may, at its option, cancel and turn over to other contractors so much of the work herein contracted for as may be in excess of the demonstrated capacity of the Switch Company.

The Switch Company shall have the right to anticipate and increase the monthly deliveries above specified.

Deliveries made by the Switch Company in advance of the dates, or in excess of the quantities specified in the above schedules shall be credited upon subsequent deliveries.

**Delivery:** All shells hereby contracted for shall be delivered by the Switch Company f. o. b. cars Switch Company's works, Swissvale, Pa.

**Terms of Payment:** All payments made by the Steel Company to the Switch Company shall be made ten (10) days after the Steel Company receives payment from the English Government, that is, the Steel Company will pay

fifty per cent. (50%) for each lot ten (10) days after it receives its first payment on account, and the remaining fifty per cent. (50%) ten (10) days after it receives the final payment for each lot of shells delivered f. a. s. New York.

**Inspection:** It is understood and agreed that His Britannic Majesty's Government and the Steel Company shall have the right of having inspectors or representatives where the work herein provided for is being done, and the Switch Company, or its sub-contractors, shall furnish all facilities required by such inspectors or representatives. The Switch Company at its expense shall furnish all gauges, including master gauges and templets to be used in connection with the manufacture of the shells hereby contracted for.

The Steel Company agrees to save harmless the Switch Company from any and all loss, damage or expense of whatsoever kind and nature for which the Switch Company may be liable by reason of any injury or accident to any inspector or representative of the Steel Company.

**Storage:** Upon written notice from the Steel Company of its inability to provide transportation, the Switch Company agrees to store at its works and at its expense but at the Steel Company's risk, for a period of sixty (60) days, all shells contracted for hereunder which have been finally inspected by an inspector of His Britannic Majesty's Government, and are ready for delivery. Shells so stored shall be deemed delivered when so stored and shall be paid for according to provisions hereof with respect to time of payment. Such payment, however, shall not be construed as a waiver of the obligations of the Switch Company to deliver these shells so stored to the Steel Company, f. o. b. cars Switch Company's works, Swissvale, Pa. After the expiration of sixty (60) days the Steel Company agrees to remove same.

**Contingencies:** It is understood and agreed that the Switch Company is not to be held responsible or liable for

any loss, damage, detention or delay caused by fires, strikes, floods, civil or military authority, by insurrection or riot, or for any other causes beyond its reasonable control, except that such cause shall not affect the right of the Steel Company as hereinbefore set forth, to cancel, in case of failure of the Switch Company to make deliveries as hereinbefore provided.

**Scrap:** All scrap necessarily resulting shall become the property of the Switch Company, but if the Switch Company shall spoil or lose any materials furnished by the Steel Company, then the Steel Company is to be reimbursed for such materials as follows: Steel for nose bushings, three (3) cents a pound; all other materials at Steel Company's net cost, based upon weights and quantities delivered f. o. b. cars Switch Company's works. In case the Switch Company should spoil or lose hollow shell forgings, base plate forgings, or copper bands, the Steel Company is to be reimbursed for the same as follows: Hollow shell forgings, twelve cents (12c) each; copper bands, fifty cents (50c) each. All of said materials, if the Steel Company is reimbursed as herein provided, shall become the property of the Switch Company.

**Defective Material:** The Steel Company agrees that if any material furnished by it is rejected or proved defective by the Switch Company, and is so verified by the Steel Company, which shall be done daily, such material shall be promptly replaced by the Steel Company free of all cost, upon the request of the Switch Company, the Steel Company agreeing to promptly reimburse the Switch Company for the cost of any machine work done on such defective material in accordance with the following schedules:

|                          |        |
|--------------------------|--------|
| 1. Rough face base.....  | \$ .09 |
| 2. Drill center.....     | .13    |
| 3. Cut off open end..... | .21    |

4. Rough turn outside diameter to 4.540".  
True up base face. Finish turn base  
end for a distance of  $1\frac{1}{2}$ " from end.  
Turn 1050" radius on base end..... .61
5. Bore and face open end..... 1.15
6. Chamfer open end..... 1.25
7. Close in open end..... 1.33
8. Bore, finish face and tap nose end..... 1.61
9. Size tap and insert nose bush.....
10. Finish turn outside diameter..... 2.11
11. Weigh and mark amount to be removed
12. Face to weight, counterbore and tap for  
base plate..... 2.45
13. Check the weight..... 2.47
14. Hand tap for base plate, notch wave  
ribs and unscrew nose bush..... 2.55
15. Cut groove and wave ribs..... 2.75

Provided, always, that no more work is done than is actually required to disclose that the material furnished by the Steel Company is defective. Such defective material shall remain the property of the Steel Company and be subject to its instructions for disposition at the Steel Company's expense.

**Bond:** The Switch Company agrees to join in a bond to His Britannic Majesty's Government as one of two sureties with the Steel Company as principal, and to become responsible to the Steel Company and to the British War Office by reason of defective work of the Switch Company, or for the refunding of any money which the Switch Company may have received for such shells so rejected, all matters of rejection and methods of replacement being subject to said British War Office specifications; the Steel Company hereby agreeing to indemnify and save harmless the Switch Company for any liability resulting in said bond, excepting for that caused by defective work done by the Switch Company.

**Firing Tests:** It is mutually understood and agreed between the parties hereto that in view of the fact that the aforementioned contract with His Britannic Majesty's Government provides for a test by firing one shell out of every one hundred twenty-one (121) shells delivered, for which shells so used the Steel Company does not receive payment, the Switch Company will not make any charge for any work done by it upon the actual number of such shells so used by the British War Office for firing test. It is further agreed that the Switch Company shall not charge or receive payment for any work done upon any shells or parts of shells which may be used for test purposes under the process of manufacture or before final acceptance and shipment from its works.

The Switch Company agrees to furnish to the Steel Company, whenever requested so to do, detailed reports of the materials received, used, spoiled, rejected and on hand, and the progress made in the manufacture and shipment of the shells herein provided for.

THIS AGREEMENT is executed in duplicate as of the day and year first above written by the several parties hereto, by and through their officers duly authorized thereunto.

Attest:

CARBON STEEL COMPANY

W. W. NOBLE

By CHARLES McKNIGHT,

(Seal)

Pt.

Attest:

THE UNION SWITCH & SIGNAL COMPANY

T. S. GRUBBS

By W. D. UPTGRAFF, President.

(Seal)



Swissvale, Pa., October 18th, 1915.

Carbon Steel Company,  
Foot of 32nd St.,  
Pittsburgh, Pa.

Dear Sirs:

In construing the recitals and covenants of the contract between us, dated October 18th, 1915, it is understood that the incorporation of your contract with His Britannic Majesty's Government, by reference therein, confers no obligation on you to place further orders with us in the event of the exercise of "Option for Further Purchases," therein conferred by His Britannic Majesty's Government, and that in the event of the cancellation of such contract by His Britannic Majesty's Government for any of the causes set forth in the paragraph entitled "Conditions," you shall have the right to cancel this contract between us upon the same terms as to notice and assumption of obligations as therein set forth, payment of such obligations by you to us, however, to be limited to the amounts received from His Britannic Majesty's Government by you for that purpose on receipt of same.

Yours very truly,

THE UNION SWITCH & SIGNAL COMPANY

W. D. UPTGRAFF

President.

We hereby accept and approve the same.

CARBON STEEL COMPANY

CHARLES McKNIGHT,

President.

## CARBON STEEL COMPANY

## PURCHASING DEPARTMENT

Foot of 32nd Street

Pittsburgh, Pa., Dec. 27, 1915.

To

National Sewing Machine Co. Order No. B-10109-X  
Belvidere, Ill. Required for  
Account No.

Please enter our order for the following, stating in your acknowledgement when shipment will be made.

425,000  $\frac{1}{4}$ " fixing screws, in accordance with our blue print accompanying our letter of December 15, 1915, at \$4.00 per M. f. o. b. Belvidere, Ill.

Terms: Thirty days net or 2% discount ten days from date of invoices.

Freight must be prepaid and added to invoices.

Shipments: 15,000 screws by express to Carbon Steel Company, Pittsburgh, Pa., before January 1, 1916.

410,000 screws to be shipped in about equal monthly quantities during January, February, March and April, 1916, and each month's quota to be shipped via freight, between the 1st and 15th of the respective months. These shipments to be made in equal quantities, for our account to Union Switch & Signal Company, W. M. Department,

Swissvale, Pa., and to Westinghouse Machine Company, East Pittsburgh, Pa., and shipped concurrently.

It is understood that any undelivered portion of this order is subject to cancellation by the Carbon Steel Company if our order from the English Government is cancelled but such cancellation will become effective only on ninety days written notice.

It is further understood that the Carbon Steel Company has an option from the English Government to increase their order from 425,000 to 600,000 shells and if this option is taken up by us that we shall have the right to purchase from you the additional 175,000 screws on the same terms and at the same price as named in this order. The additional 175,000 screws, if required, shall be ordered by the Carbon Steel Company before the date of shipment of the last lot of screws as stated in this order, and the additional lot to be delivered during May and June, 1916 in equal monthly quantities and divided between the Union Switch and Signal Co. and the Westinghouse Machine Company, same proportion as this order.

CARBON STEEL COMPANY.

## CARBON STEEL COMPANY

PURCHASING DEPARTMENT

Foot 32nd Street

Pittsburgh, Pa., November 20, 1915.

To

Ellsworth Hardwood Co.,  
Ellsworth, Maine.Order No. B-9435  
Required for  
Account No.

Please enter our order for the following, stating in your acknowledgment when shipment will be made.

600,000 Wooden Plugs, threaded and coated with paraffine, the same in all respects as samples submitted per your letter dated Nov. 9, 1915.

Ship 300,000 to Westinghouse Machine Company,  
East Pittsburgh, Pa.

Ship 300,000 to Union Switch & Signal Co.,  
W. M. Dept., Swissvale, Pa.

\$8.75 M f. o. b. East Pittsburgh or Swissvale.  
Shipments to be made at rate of 10,000 per week to each destination. Prepay freight charges and mark all consignments "a/c of Carbon Steel Co." Furnish shipping advice, omitting price, to consignee.

Terms:—30 days net, or 1% for cash in 10 days from date of invoice.

It is understood that the Carbon Steel Company has the privilege of specifying an additional quantity of plugs up to 5% of the total quantity of 600,000 ordered, each additional quantity to be specified prior to completing shipment on contract.

It is further understood and agreed that should the English Government cancel any part of its contract with the Carbon Steel Company for shells for use on which these plugs are intended, the Carbon Steel Company shall have the right to cancel a similar portion of this order. In case of such cancellation, the Carbon Steel Company will pay for all plugs manufactured and ready for shipment, or in actual process of turning at the time of cancellation. The Carbon Steel Company shall also have the right to cancel any portion of this order if the design or quality of the plugs is not satisfactory to the Representative of the English Government.

(See our Mr. D. R. Wilson's letter of Nov. 1, 1915.)

CARBON STEEL COMPANY

## STANDARD UNDERGROUND CABLE CO.

Westinghouse Building, Pittsburgh, Pa.

Pittsburgh, Penna.,

Sept. 23, 1915.

CARBON STEEL COMPANY,

Pittsburgh, Penna.

Gentlemen:

## RE CONTRACT FOR 547,500 LBS. COPPER TUBES.

This will confirm our sale to you as arranged with our Mr. R. S. Hopkins in New York on September 21st and further discussed yesterday between Treasurer Wilson of your Company and the writer, namely—

We are to furnish you 547,500 pounds seamless drawn copper tubes in run of mill lengths from 8 to 12 feet, same to have internal diameter 4.460 inches and external diameter 4.940 inches, all dimensions subject to a tolerance of 10 mils (010") either way.

Shipments to be made to you at East Pittsburgh or Swissvale, Pa., (as you may later direct), approximately as follows: namely—

|                           |              |
|---------------------------|--------------|
| Nov. 1st to Nov. 15.....  | 37500 pounds |
| Nov. 16th to Dec. 15..... | 75000 "      |
| Dec. 16th to Jan. 15..... | 75000 "      |
| Jan. 16th to Feb. 15..... | 90000 "      |
| Feb. 16th to Mar. 15..... | 90000 "      |
| Mar. 16th to Apr. 15..... | 90000 "      |
| Apr. 16th to May 15.....  | 90000 "      |

Total Nov. 1, 1915 to May

15, 1916.....547,500 "

You have agreed to pay us for said tubes thirty two (32) cents per pound including payment or allowance of freight by us to East Pittsburgh or Swissvale. Terms of payments to be thirty days net from date of shipment and invoice, or 1% cash discount allowed if payments are made by you on the 20th of each month for invoices dated from the 1st to the 15th of the same month, or by the 5th of the month for invoices dated from the sixteenth to the end of the previous month.

You have further agreed that if for any reason, and in so far as this order or contract, or any portion thereof is cancelled or the material referred to herein is not taken, you will pay us as agreed liquidated damage (and not by way of penalty) 11.2 cents per pound for all material not taken; such payments to be paid upon cancellation, or in any case not later than the dates when payments would have been due had shipments been made as contemplated under this contract.

Kindly return one copy hereof with your acceptance in confirmation of the agreement and terms of sale set forth herein.

Thanking you for your order, we are,

Very truly yours,

(Signed) P. H. W. SMITH

ACCEPTED: Pittsburgh, Pa., Sept. 24, 1915. Vice President

It is understood and agreed that the copper tubes above referred to will meet the specifications, known as <sup>L</sup><sub>3472-M</sub> issued by the English War Office, insofar as they concern the driving bands. These specifications state that the ring shall not contain more than .004% Bismuth and .01% Antimony, and further that the bands shall be capable of a test of being doubled and hammered flat upon itself without breaking or showing cracks.

ACCEPTED: Pittsburgh, Pa., Sept. 24, 1915.

CARBON STEEL COMPANY

(Signed) D. R. WILSON

Treasurer.

**STIPULATION OF FACT.**

Filed Oct. 7th 1918.

For the purposes of the above entitled case, the following facts are admitted by counsel for the respective parties, viz.:

**FIRST:** The Carbon Steel Company is a corporation organized and existing under the laws of the State of West Virginia. C. G. Lewellyn is the Collector of Internal Revenue for the 23rd District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.

**SECOND:** The Carbon Steel Company on the 25th day of June, 1917, after an examination of its books by an agent of the Department of Internal Revenue, pursuant to the request of such agent, made a return under protest under Title III of an Act approved September 8th, 1916, known as Munition Manufacturers' Tax, a copy of which return and protest is attached to and made a part of plaintiff's statement as Exhibit "A."

**THIRD:** Pursuant to the request embodied in said protest hereinbefore referred to, a hearing was had before the Deputy Commissioner of Internal Revenue at Washington, D. C., at which hearing counsel for the Carbon Steel Company submitted briefs and argued the matter at length, and, thereafter, under date of October 4th, 1917, plaintiff was notified by Daniel C. Roper, Commissioner of Internal Revenue, that at an early date it would be assessed for Munition Manufacturer's Tax in the amount of \$271,062.62, said notification being in the form of a letter, a copy of which is attached hereto, made part hereof and marked Exhibit "A."

**FOURTH:** Thereafter, under date of October 30th, 1917, the said C. G. Lewellyn, acting under instructions



from the Commissioner of Internal Revenue at Washington, D. C., mailed notice and demand of Munition Manufacturer's Tax assessed against the plaintiff amounting to \$271,062.62.

FIFTH: Said notice and demand of the said C. G. Lewellyn, Collector, for the payment of said Munition Manufacturers' Tax, recited that if the tax was not paid on or before November 29th, 1917, it would be the duty of the Collector to collect said Tax, together with 5% additional, with interest at the rate of 1% a month until paid.

SIXTH: That subsequently, on the 30th day of November, the said 29th day being a legal holiday, plaintiff filed with defendant, for presentation to the Commissioner of Internal Revenue, a claim for abatement of said Munition Manufacturers' Tax amounting to \$271,062.62, a copy of which claim is attached to and made part of plaintiff's statement as Exhibit "B."

SEVENTH: That thereafter plaintiff, not having been advised of favorable action upon said claim, and to avoid the liability for interest at the rate of 1% a month, on December 29th, 1917, paid to the said C. G. Lewellyn, Collector, said Munition Manufacturer's Tax as assessed for the period ending December 31st, 1916, in the sum of \$271,062.62, and at the same time filed with the said C. G. Lewellyn a written protest, a copy of which protest is attached to and made part of plaintiff's statement as Exhibit "C." That, thereafter, under date of January 28th, 1918, the said C. G. Lewellyn notified plaintiff that the said claim for abatement had been rejected by the Department at Washington.

EIGHTH: Plaintiff in the year 1915 entered into three certain contracts with His Britannic Majesty's Government, providing for the delivery to the duly author-

ized agents of said Government of 4½" Howitzer shells fitted with nose bushings and driving bands, which contracts entered into were obtained and performed in the manner following:

NINTH: In the fall of 1914 Charles McKnight, President of plaintiff Company, went to England, and after a stay of some months, procured a contract from His Britannic Majesty's Government for the delivery to the authorized representatives of said Government f. a. s. New York, of 75,000 4½" Lyddite shells, said contract being dated January 26th, 1915 and bearing reference No. S/8005 (1-A). Thereafter, during the year 1915, plaintiff entered into two further contracts with His Britannic Majesty's Government through their fiscal agents, J. P. Morgan & Company, the said second contract covering the delivery f. a. s. New York to the duly authorized agent of said Government of 425,000 of the same shells, with an option to said Government of taking up to 600,000 of said shells under certain conditions, said contract bearing date, September 29th, 1915. Thereafter, during the year 1915, plaintiff entered into a third contract with His Britannic Majesty's Government covering the delivery f. a. s. New York to the duly authorized agent of said Government of 15,000 of the same shells, said contract bearing date October 7th, 1915. Under all of said contracts plaintiff caused to be delivered to the duly authorized agents of His Britannic Majesty's Government, f. a. s. New York, a total of 548,316—4½ inch Howitzer shells, fitted with nose bushings and driving bands and duly received payment therefor.

TENTH: The procedure employed by plaintiff in fulfilling each of said contracts was similar and was as hereinafter set forth, being the procedure employed in fulfilling the larger part of the contract with His Britannic Majesty's Government dated September 29th, 1915, covering 425,000 of said shells.

ELEVENTH: The work necessary to complete a shell in accordance with the said contracts with His Britannic Majesty's Government is as follows:

- (1) Obtaining suitable steel in bar form;
- (2) Cutting or breaking said steel bars to proper length;
- (3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
- (4) The turning of said shell upon a lathe to exact dimensions;
- (5) Closing in one end of said forging to form the nose of the shell;
- (6) Drilling out the case of said shell and the inserting of a base plate;
- (7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
- (8) Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to required dimensions;
- (9) Varnishing, greasing and crating of the completed shell.

TWELFTH: Plaintiff was not equipped, nor did it have the facilities for doing any of said work except the manufacture of steel suitable for said shells in bar form, and, therefore, to procure the manufacture of said shells, plaintiff did certain work and entered into numerous

contracts, which work and contracts in relation to the several steps in making a completed shell were as follows:

1.

**OBTAINING SUITABLE STEEL IN BAR FORM.**

Plaintiff manufactured suitable steel in its plant in bar form in what is known as mill lengths, that is, such lengths as the various ingots roll out to when reduced to a bar of the required diameter.

2.

**CUTTING OR BREAKING SAID STEEL  
BARS TO PROPER LENGTH.**

The said steel bars manufactured by plaintiff in its plant in bar form in mill lengths were delivered to the Brown & Zortman Machine Company of Pittsburgh, Pa., which Company partially sawed, cut or indented said bars at points representing the required lengths of shell forgings, said process being known in the trade as nicking the bars; the said bars after nicking were redelivered to the Carbon Steel Company, which then broke or separated them into short lengths, said short lengths being known in the trade as slugs.

3.

**CONVERTING SAID CUT BARS OR SLUGS  
INTO A HOLLOW SHELL FORGING BY  
MEANS OF A HYDRAULIC PRESS.**

The said slugs were then delivered to the Westinghouse Machine Company, a corporation of the State of Pennsylvania, at East Pittsburgh, Pa., which Company, pursuant

to a contract with the Carbon Steel Company, dated the 18th day of October, 1915, converted said slugs by forging into hollow shell forgings, and annealed, that is, softened by heat treatment, said hollow shell forgings to render them suitable for machining. The plaintiff then caused the said hollow shell forgings to be delivered in approximately equal quantities, to the said Westinghouse Machine Company and said Union Switch & Signal Company, a corporation of the State of Pennsylvania, of the Borough of Swissvale, Pa.

4.

**THE TURNING OF SAID SHELL UPON A  
LATHE TO EXACT DIMENSIONS.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the necessary lathe work upon said shell forgings, pursuant to contracts bearing date the 18th day of October, 1915.

5.

**CLOSING IN ONE END OF SAID FORGING  
TO FORM THE NOSE OF THE SHELL.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work, pursuant to contracts bearing date the 18th day of October, 1915.

6.

**DRILLING OUT THE BASE OF SAID SHELL  
AND THE INSERTING OF A BASE PLATE.**

When required, the said base plate not being required by His Britannic Majesty's Government upon all of said shells, the said Westinghouse Machine Company and said

Union Switch & Signal Company drilled out the base of said shell and inserted a base plate, pursuant to contracts bearing date the 18th day of October, 1915.

## 7.

**THREADING OF THE NOSE OF THE SHELL AND  
THE INSERTION OF THE NOSE BUSHING,  
AND THE INSERTION IN SAID NOSE  
BUSHING OF A WOODEN PLUG TO  
PROTECT THE THREAD THEREOF.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work pursuant to contracts bearing date the 18th day of October, 1915, the said wooden plugs being supplied by the plaintiff.

## 8.

**CUTTING A GROOVE AROUND THE CIRCUMFER-  
ENCE OF SAID SHELL AND INSERTION  
THEREIN OF A COPPER DRIVING BAND  
AND THE TURNING OF SAID BAND  
TO REQUIRED DIMENSIONS.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work pursuant to contracts bearing date the 18th day of October, 1915.

## 9.

**VARNISHING, GREASING AND CRATING  
OF THE COMPLETED SHELL.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work, pursuant to contracts bearing date the 18th day of

October, 1915, the varnish and grease required therefor being supplied by plaintiff.

**THIRTEENTH:** In the doing of the above described work the said Westinghouse Machine Company and said Union Switch & Signal Company were supplied with wooden plugs to protect the threads in the nose of said shells, known as transit plugs, by plaintiff, which purchased same from the Ellsworth Hardwood Company, Ellsworth, Maine, pursuant to contract dated November 20th, 1915.

In the doing of the above described work the said Westinghouse Machine Company and said Union Switch & Signal Company were supplied with fixing screws by plaintiff, which fixing screws were procured by plaintiff from the National Sewing Machine Company of Belvedere, Ill., pursuant to contract dated September 27th, 1915.

In the doing of the above described work the Union Switch & Signal Company was supplied by plaintiff with copper tubing, which copper tubing was obtained from the Standard Underground Cable Company of Pittsburgh, Pa., pursuant to contract dated September 23rd, 1915. The said copper tubing was then cut by said Union Switch & Signal Company into rings and plaintiff caused said rings to be delivered to the Union Switch & Signal Company and Westinghouse Machine Company, which companies inserted said rings in appropriate grooves cut in said shells and turned the same to required dimensions to constitute what is known as the copper driving band.

In the doing of said work the said Westinghouse Machine Company and said Union Switch & Signal Company were furnished by plaintiff with grease, varnish, cement and other incidentals, which were procured by plaintiff from various persons, firms and corporations by miscellaneous written orders or verbal instructions.

In the doing of the above work the said Westinghouse Machine Company and said Union Switch & Signal Company packed or crated at their own expense the said shells for export, and delivered the same to a common carrier for transportation to New York f. o. b. cars said companies' works. Freight upon said shipments was paid by plaintiff, who in turn tendered said shells to His Britannic Majesty's Government f. a. s. New York harbor.

Throughout the doing of said work by the said Westinghouse Machine Company and the said Union Switch & Signal Company, His Britannic Majesty's Government maintained one or more inspectors at the plants of said companies, which inspectors from day to day examined the shells and approved those properly made in accordance with the specifications of His Britannic Majesty's Government.

FOURTEENTH: The Westinghouse Machine Company was at the time of doing the above described work, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and had its plant in the Borough of East Pittsburgh, Allegheny County, Penna. Said Westinghouse Machine Company was a separate and independent corporation of which neither the capital stock nor business policy were in any manner connected with or controlled by plaintiff, its officers, directors or stockholders, nor was said Westinghouse Machine Company a subsidiary of plaintiff.

The Union Switch & Signal Company at the time of doing the above described work, was a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and had its plant in the Borough of Swissvale, Allegheny County, Pennsylvania. The said Union Switch & Signal Company was a separate and independent corporation of which neither the capital stock nor business policy were in any manner connected or



controlled by plaintiff, its officers, directors or stockholders, nor was said Union Switch & Signal Company a subsidiary of plaintiff.

At the time of doing the above described work the Brown & Zortman Machine Company, the Standard Underground Cable Company, the Ellsworth Hardwood Company and the National Sewing Machine Company were all corporations duly organized and existing under the laws of the several states, having their plants at various locations, and were separate and independent corporations of which neither the capital stock nor business policy were in any manner connected with or controlled by plaintiff, its officers, directors or stockholders, nor were any of said corporations subsidiaries of plaintiff.

**FIFTEENTH:** The Westinghouse Machine Company and the Union Switch & Signal Company were duly assessed and paid a Munition Manufacturers' Tax for the year 1916 upon the net profits realized by said Companies from the manufacture of munitions as defined by said Act approved September 8th, 1916.

**SIXTEENTH:** For the purpose of keeping separate the profit upon said shell contracts, plaintiff opened a separate set of books, upon which books it credited to an account, known as Special Contract Account, the advance payments received from His Britannic Majesty's Government on account of said work and from said account made all payments to sub-contractors and other payments for expenses connected with said work, and credited to said account all money received from His Britannic Majesty's Government, and when said contracts were finally completed, transferred to the general books of plaintiff the remaining net profit in said account. The said net profit in said Special Contract Account as a result, did not show in any way upon the general books of plaintiff until all of

said work was done and said net profit was finally determined and then entered upon plaintiff's general books.

SEVENTEENTH: Plaintiff charged to said Special Contract Account the steel bars in mill lengths manufactured by it at market prices for the purpose of determining the net profit upon said shell contracts, in the same manner as if plaintiff had purchased said steel bars in mill lengths in the open market because said work was not a part of plaintiff's business.

EIGHTEENTH: Plaintiff in making its return under protest, under an Act approved September 8th, 1916, known as Munition Manufacturers' Tax, a copy of which return is attached to and made part of plaintiff's statement as Exhibit "A", at the demand of said agent of the Department of Internal Revenue, altered said charge for steel bars in mill lengths so as to reflect the same in its return at cost price instead of market price, therefore adding to the amount upon which plaintiff was taxed, the profit shown on plaintiff's general books upon said steel bars in mill lengths. The amount of the profit so added in said return was \$120,899.10, upon which the Munition Manufacturers' Tax as assessed by the Government amounted to \$15,112.39, making the total tax paid by plaintiff so sub-divided as follows:

|  |              |
|--|--------------|
| Tax upon increased profit caused by charging |              |
| steel at cost instead of market prices.....  | \$ 15,112.39 |
| Tax upon balance of profit.....              | 255,950.23   |
|  | <hr/>        |
| Total tax paid.....                          | \$271,062.62 |

NINETEENTH: In plaintiff's return made under protest, a copy of which is attached to and made part of plaintiff's statement as Exhibit "A," line 1 in said return is blank because plaintiff had none of its capital employed

in said work; line 2 is blank for the reason that plaintiff contracted no debts or loans to meet the needs of such business; line 3 represents the gross amount of money received from His Britannic Majesty's Government for the sale of said shells; line 4 represents the net cost to plaintiff of steel manufactured by it in mill lengths and other raw materials used by plaintiff's sub-contractors in the manufacture of said shells; line 5 represents all expenses connected with procuring and fulfilling said contracts with His Britannic Majesty's Government by way of traveling expenses, incidentals and other items; line 5½, inserted by plaintiff in its return, represents the total sums paid to the firms manufacturing said shells; lines 6, 7, 8, 9 and 10 are blank because the subject matter of none of said items was involved under the method employed by plaintiff in carrying out its contract with His Britannic Majesty's Government; line 11 represents the net profit to plaintiff as appearing in said Special Contract Account, plus the profit on said steel bars and the amount upon which plaintiff was assessed a Munition Manufacturers' Tax of 12½%, or \$271,062.62.

H. V. BLAXTER,  
F. DEC. FAUST,  
Attorneys for Carbon Steel Co.

B. B. MCGINNIS,  
Special Assistant United States  
Attorney and Attorney for the  
Defendant.

## EXHIBIT "A."

## TREASURY DEPARTMENT

Office of  
Commissioner of  
Internal Revenue.  
Ref. MMT-BGM  
Carbon Steel Company,  
Pittsburgh,  
Pa.

WASHINGTON

October 4, 1917.

Gentlemen:—

Reference is made to the recent visit to this office of your President, Mr. Charles McKnight, and your attorneys, Messrs. F. D. Faust and H. V. Blaxter, with reference to the tax of \$271,062.62, which was recommended by the Munitions Agents as being due from your Company under the provisions of Title 3 of the Act of September 8, 1916. This tax is based upon the proposed inclusion in Form 1089 of the income received from contracts entered into by your corporation to furnish the English Government with a certain number of Howitzer shells fitted with nose bushings and driving bands. In view of the fact that the plant was not capable of doing the work called for on such shells, your company furnished the Westinghouse Machine Co. and the Union Switch & Signal Co. with the material from which such shells were to be manufactured. It appears that the steel to be used was manufactured by your corporation and that the copper and other material necessary were purchased by your company and furnished the two above named corporations, with which you had entered into an agreement to perform the necessary work to carry out the contract, and in pursuance of the contract between your company and the Westinghouse and Union Switch & Signal Cos. these contracts were completed and the shells shipped to New York, which was the place of destination under your agreement with the British Government.

Your contention is in effect that in view of the fact that although your corporation had entered into a contract with the British Government to furnish a certain number of shells and had manufactured or purchased the material from which they were to be made, and retained at all times until delivered to the British Government title to the raw material and the finished shells (subject, of course, to any lien that the sub-contractor may have had for labor performed) your company did not in fact manufacture or do any manufacturing work on such shells and for that reason was not liable to the tax imposed by the Act mentioned above.

After careful consideration of the information furnished by your representatives, this office is of the opinion that your company should be considered a manufacturer of the shells which you guaranteed to furnish and did furnish to the English Government, and therefore the profit arising to your corporation from such completed contract or contracts is properly taxable under the provisions of Title 3 of the Act of September 8, 1916, and consequently the tax of \$271,062.62 recommended will be assessed at any early date and notice of the same being due and payable will be given by the Collector of Internal Revenue of your District.

Respectfully,

(Signed) Daniel C. Roper

Commissioner

AMW

## REQUEST FOR FINDINGS OF FACT AND CONCLUSION OF LAW.

Filed October 7, 1918.

Plaintiff's counsel respectfully requests the Court to make the following findings of fact:

FIRST: The Carbon Steel Company is a corporation organized and existing under the laws of the State of West Virginia. C. G. Lewellyn is the Collector of Internal Revenue for the 23rd District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.

SECOND: The Carbon Steel Company on the 25th day of June, 1917, after an examination of its books by an agent of the Department of Internal Revenue, pursuant to the request of such agent, made a return under protest under Title III of an Act approved September 8th, 1916, known as Munition Manufacturers' Tax, a copy of which return and protest is attached to and made a part of plaintiff's statement as Exhibit "A."

THIRD: Pursuant to the request embodied in said protest hereinbefore referred to, a hearing was had before the Deputy Commissioner of Internal Revenue at Washington, D. C., at which hearing counsel for the Carbon Steel Company submitted briefs and argued the matter at length, and, thereafter, under date of October 4th, 1917, plaintiff was notified by Daniel C. Roper, Commissioner of Internal Revenue, that at an early date it would be assessed for Munition Manufacturers' Tax in the amount of \$271,062.62, said notification being in the form of a letter, a copy of which is attached hereto, made part hereof and marked Exhibit "A."

FOURTH: Thereafter, under date of October 30ths 1917, the said C. G. Lewellyn, acting under instruction,

from the Commissioner of Internal Revenue at Washington, D. C., mailed notice and demand of Munition Manufacturers' Tax assessed against the plaintiff amounting to \$271,062.62.

FIFTH: Said notice and demand of the said C. G. Lewellyn, Collector, for the payment of said Munition Manufacturers' Tax recited that if the tax was not paid on or before November 29th, 1917, it would be the duty of the Collector to collect said Tax, together with 5% additional, with interest at the rate of 1% a month until paid.

SIXTH: That subsequently on the 30th day of November, the said 29th day being a legal holiday, plaintiff filed with defendant for presentation to the Commissioner of Internal Revenue, a claim for abatement of said Munition Manufacturers' Tax amounting to \$271,062.62, a copy of which claim is attached to and made part of plaintiff's statement as Exhibit "B."

SEVENTH: That thereafter plaintiff, not having been advised of favorable action upon said claim, and to avoid the liability for interest at the rate of 1% a month, on December 29th, 1917, paid to the said C. G. Lewellyn, Collector, said Munition Manufacturers' Tax as assessed for the period ending December 31st, 1916, in the sum of \$271,062.62, and at the same time filed with the said C. G. Lewellyn a written protest, a copy of which protest is attached to and made part of plaintiff's statement as Exhibit "C." That, thereafter, under date of January 28th, 1918, the said C. G. Lewellyn notified plaintiff that the said claim for abatement had been rejected by the Department at Washington.

EIGHTH: Plaintiff in the year 1915 entered into three certain contracts with His Britannic Majesty's Government providing for the delivery to the duly author-

ized agents of said Government of 4½" Howitzer shells, fitted with nose bushings and driving bands, which contracts entered into were obtained and performed in the manner following:

NINTH: In the fall of 1914 Charles McKnight, President of plaintiff Company, went to England, and after a stay of some months, procured a contract from His Britannic Majesty's Government for the delivery to the authorized representatives of said Government f. a. s. New York, of 75,000—4½ Lyddite shells, said contract being dated January 26th, 1915 and bearing reference No. S/8005 (1-A). Thereafter, during the year 1915, plaintiff entered into two further contracts with His Britannic Majesty's Government through their fiscal agents, J. P. Morgan & Company, the said second contract covering the delivery f. a. s. New York to the duly authorized agent of said Government of 425,000 of the same shells with an option to said Government of taking up to 600,000 of said shells under certain conditions, said contract bearing date September 29th, 1915. Thereafter, during the year 1915, plaintiff entered into a third contract with His Britannic Majesty's Government covering the delivery f. a. s. New York to the duly authorized agent of said Government of 15,000 of the same shells, said contract bearing date October 7th, 1915. Under all of said contracts plaintiff caused to be delivered to the duly authorized agents of His Britannic Majesty's Government, f. a. s. New York, a total of 548,316—4½ inch Howitzer shells, fitted with nose bushings and driving bands and duly received payment therefor.

TENTH: The procedure employed by plaintiff in fulfilling each of said contracts was similar and was as hereinafter set forth, being the procedure employed in fulfilling the larger part of the contract with His Britannic Majesty's Government dated September 29th, 1915, covering 425,000 of said shells.



ELEVENTH: The work necessary to complete a shell in accordance with the said contracts with His Britannic Majesty's Government is as follows:

- (1) Obtaining suitable steel in bar form;
- (2) Cutting or breaking said steel bars to proper length;
- (3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
- (4) The turning of said shell upon a lathe to exact dimensions;
- (5) Closing in one end of said forging to form the nose of the shell;
- (6) Drilling out the base of said shell and the inserting of a base plate;
- (7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
- (8) Cutting a groove around the circumference of said shell and insertion therein of a copper driving band and the turning of said band to required dimensions;
- (9) Varnishing, greasing and crating of the completed shell.

TWELFTH: Plaintiff was not equipped, nor did it have the facilities for doing any of said work except the manufacture of steel suitable for said shells in bar form, and, therefore, to procure the manufacture of said shells, plaintiff did certain work and entered into numerous

contracts, which work and contracts in relation to the several steps in making a completed shell were as follows:

1.

**OBTAINING SUITABLE STEEL IN BAR FORM**

Plaintiff manufactured suitable steel in its plant in bar form in what is known as mill lengths, that is, such lengths as the various ingots roll out to when reduced to a bar of the required diameter.

2.

**CUTTING OR BREAKING SAID STEEL  
BARS TO PROPER LENGTH.**

The said steel bars manufactured by plaintiff in its plant in bar form in mill lengths were delivered to the Brown & Zortman Machine Company of Pittsburgh, Pa., which Company partially sawed, cut or indented said bars at points representing the required lengths of shell forgings, said process being known in the trade as nicking the bars; the said bars after nicking were redelivered to the Carbon Steel Company, which then broke or separated them into short lengths, said short lengths being known in the trade as slugs.

3.

**CONVERTING SAID CUT BARS OR SLUGS  
INTO A HOLLOW SHELL FORGING  
BY MEANS OF A HYDRAULIC PRESS.**

The said slugs were then delivered to the Westinghouse Machine Company, a corporation of the State of Pennsylvania, at East Pittsburgh, Pa., which company, pursuant

to a contract with the Carbon Steel Company, dated the 18th day of October, 1915, converted said slugs by forging into hollow shell forgings, and annealed, that is, softened by heat treatment, said hollow shell forgings to render them suitable for machining. The plaintiff then caused the said hollow shell forgings to be delivered in approximately equal quantities, to the said Westinghouse Machine Company and said Union Switch & Signal Company, a corporation of the State of Pennsylvania, of the Borough of Swissvale, Pa.

4.

**THE TURNING OF SAID SHELL UPON  
A LATHE TO EXACT DIMENSIONS.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the necessary lathe work upon said shell forgings, pursuant to contracts bearing date the 18th day of October, 1915.

5.

**CLOSING IN ONE END OF SAID FORGING  
TO FORM THE NOSE OF THE SHELL.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work, pursuant to contracts bearing date the 18th day of October, 1915.

6.

**DRILLING OUT THE BASE OF SAID SHELL  
AND THE INSERTING OF A BASE PLATE.**

When required, the said base plate not being required by His Britannic Majesty's Government upon all of said

shells, the said Westinghouse Machine Company and said Union Switch & Signal Company drilled out the base of said shell and inserted a base plate, pursuant to contracts bearing date the 18th day of October, 1915.

7.

**THREADING OF THE NOSE OF THE SHELL AND  
THE INSERTION OF THE NOSE BUSHING,  
AND THE INSERTION IN SAID NOSE  
BUSHING OF A WOODEN PLUG TO  
PROTECT THE THREAD THEREOF.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work pursuant to contracts bearing date the 18th day of October, 1915, the said wooden plugs being supplied by the plaintiff.

8.

**CUTTING A GROOVE AROUND THE CIR-  
CUMFERENCE OF SAID SHELL AND  
INSERTION THEREIN OF A COPPER  
DRIVING BAND AND THE TURNING  
OF SAID BAND TO REQUIRED  
DIMENSIONS.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described work pursuant to contracts bearing date the 18th day of October, 1915.

9.

**VARNISHING, GREASING AND CRATING  
OF THE COMPLETED SHELL.**

The said Westinghouse Machine Company and said Union Switch & Signal Company did the above described

work, pursuant to contracts bearing date the 18th day of October, 1915, the varnish and grease required therefor being supplied by plaintiff.

**THIRTEENTH:** In the doing of the above described work the said Westinghouse Machine Company and said Union Switch & Signal Company were supplied with wooden plugs to protect the threads in the nose of said shells, known as transit plugs, by plaintiff, which purchased same from the Ellsworth Hardwood Company, Ellsworth, Maine, pursuant to contract dated November 20th, 1915.

In the doing of the above described work the said Westinghouse Machine Company and said Union Switch & Signal Company were supplied with fixing screws by plaintiff, which fixing screws were procured by plaintiff from the National Sewing Machine Company of Belvedere, Ill., pursuant to contract dated September 27th, 1915.

In the doing of the above described work the Union Switch & Signal Company was supplied by plaintiff with copper tubing, which copper tubing was obtained from the Standard Underground Cable Company of Pittsburgh, Pa., pursuant to contract dated September 23rd, 1915. The said copper tubing was then cut by said Union Switch & Signal Company into rings and plaintiff caused said rings to be delivered to the Union Switch & Signal Company and Westinghouse Machine Company, which companies inserted said rings in appropriate grooves cut in said shells and turned the same to required dimensions to constitute what is known as the copper driving band.

In the doing of said work the said Westinghouse Machine Company and said Union Switch & Signal Company were furnished by plaintiff with grease, varnish, cement and other incidentals, which were procured by plaintiff from various persons, firms and corporations by miscellaneous written orders or verbal instructions.

In the doing of the above work the said Westinghouse Machine Company and said Union Switch & Signal Company packed or crated at their own expense the said shells for export, and delivered the same to a common carrier for transportation to New York f. o. b. cars said Companies' works. Freight upon said shipments was paid by plaintiff, who in turn tendered said shells to His Britannic Majesty's Government f. a. s. New York harbor.

Throughout the doing of said work by the said Westinghouse Machine Company and the said Union Switch & Signal Company, His Britannic Majesty's Government maintained one or more inspectors at the plants of said companies, which inspectors from day to day examined the shells and approved those properly made in accordance with the specifications of His Britannic Majesty's Government.

FOURTEENTH: The Westinghouse Machine Company was at the time of doing the above described work, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and had its plant in the Borough of East Pittsburgh, Allegheny County, Penna. Said Westinghouse Machine Company was a separate and independent corporation of which neither the capital stock nor business policy were in any manner connected with or controlled by plaintiff, its officers, directors or stockholders, nor was said Westinghouse Machine Company a subsidiary of plaintiff.

The Union Switch & Signal Company at the time of doing the above described work, was a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and had its plant in the Borough of Swissvale, Allegheny County, Pennsylvania. The said Union Switch & Signal Company was a separate and independent corporation of which neither the capital stock nor business policy were in any manner connected or controlled by

plaintiff, its officers, directors or stockholders, nor was said Union Switch & Signal Company a subsidiary of plaintiff.

At the time of doing the above described work the Brown & Zortman Machine Company, the Standard Underground Cable Company, the Ellsworth Hardwood Company and the National Sewing Machine Company were all corporations duly organized and existing under the laws of the several states, having their plants at various locations, and were separate and independent corporations of which neither the capital stock nor business policy were in any manner connected with or controlled by plaintiff, its officers, directors or stockholders, nor were any of said corporations subsidiaries of plaintiff.

FIFTEENTH: The Westinghouse Machine Company and the Union Switch & Signal Company were duly assessed and paid a Munition Manufacturers' Tax for the year 1916 upon the net profits realized by said companies from the manufacture of munitions, as defined by said Act approved September 8th, 1916.

SIXTEENTH: For the purpose of keeping separate the profit upon said shell contracts, plaintiff opened a separate set of books, upon which books it credited to an account, known as Special Contract Account, the advance payments received from His Britannic Majesty's Government on account of said work, and from said account made all payments to sub-contractors and other payments for expenses connected with said work, and credited to said account all money received from His Britannic Majesty's Government, and when said contracts were finally completed, transferred to the general books of plaintiff the remaining net profit in said account. The said net profit in said Special Contract Account as a result, did not show in any way upon the general books of plaintiff until all of said work was done and said net profit was finally determined and then entered upon plaintiff's general books.

**SEVENTEENTH:** Plaintiff charged to said Special Contract Account the steel bars in mill lengths manufactured by it at market prices for the purpose of determining the net profit upon said shell contracts, in the same manner as if plaintiff had purchased said steel bars in mill lengths in the open market, because said work was not a part of plaintiff's business.

**EIGHTEENTH:** Plaintiff in making its return under protest, under an Act approved September 8th, 1916 known as Munition Manufacturers' Tax, a copy of which return is attached to and made part of plaintiff's statement as Exhibit "A," at the demand of said agent of the Department of Internal Revenue, altered said charge for steel bars in mill lengths so as to reflect the same in its return at cost price instead of market price, therefore adding to the amount upon which plaintiff was taxed, the profit shown on plaintiff's general books upon said steel bars in mill lengths. The amount of the profit so added in said return was \$120,899.10, upon which the Munition Manufacturers' Tax as assessed by the Government amounted to \$15,112.39, making the total tax paid by plaintiff so sub-divided as follows:

|   |                     |
|---|---------------------|
| Tax upon increased profit caused by charging<br>steel at cost instead of market prices..... | \$ 15,112.39        |
| Tax upon balance of profit.....   | 255,950.23          |
| <b>Total Tax Paid.....</b>  | <b>\$271,062.62</b> |

**NINETEENTH:** In plaintiff's return made under protest a copy of which is attached to and made part of plaintiff's statement as Exhibit "A," line 1 in said return is blank because plaintiff had none of its capital employed in said work; line 2 is blank for the reason that plaintiff contracted no debts or loans to meet the needs of such business; line 3 represents the gross amount of money received from



His Britannic Majesty's Government for the sale of said shells; line 4 represents the net cost to plaintiff of steel manufactured by it in mill lengths and other raw materials used by plaintiff's sub-contractors in the manufacture of said shells; line 5 represents all expenses connected with procuring and fulfilling said contracts with His Britannic Majesty's Government by way of traveling expenses, incidentals and other items; line 5½, inserted by plaintiff in its return, represents the total sums paid to the firms manufacturing said shells; lines 6, 7, 8, 9 and 10 are blank because the subject matter of none of said items was involved under the method employed by plaintiff in carrying out its contract with His Britannic Majesty's Government; line 11 represents the net profit to plaintiff as appearing in said Special Contract Account, plus the profit on said steel bars and the amount upon which plaintiff was assessed a Munition Manufacturers' Tax of 12½%, or \$271,062.62.

**TWENTIETH:** The Munition Manufacturers' Taxes hereinbefore referred to and duly assessed upon and paid by the Westinghouse Machine Company and the Union Switch & Signal Company included, for the purpose of the computation of the tax, all profits made by said Companies derived from the manufacturing done by them under said contracts with the Carbon Steel Company.

**TWENTY-FIRST:** The said contracts hereinbefore referred to between the Carbon Steel Company and the Westinghouse Machine Company, the Union Switch & Signal Company, the National Sewing Machine Company, the Ellsworth Hardwood Company and the Standard Underground Cable Company were carried out by said companies in the manner and form therein provided, and no verbal or written modifications in the manner of doing the work provided in said contracts were made by or consented to by the Carbon Steel Company.

**TWENTY-SECOND:** The Carbon Steel Company did not manufacture munitions in connection with its said contracts with His Britannic Majesty's Government.

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**REQUEST FOR CONCLUSION OF LAW.**

The Court is respectfully requested to make the following conclusion of law, viz.: The profits realized as aforesaid by the Carbon Steel Company were not subject to the tax imposed and collected, and the plaintiff is entitled to recover judgment in this case in the sum of \$271,062.62, with interest from December 29th, 1917.

H. V. BLAXTER,

F. DEC. FAUST,

Attorneys for Plaintiff.

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**EXHIBIT "A."**

**TREASURY DEPARTMENT**

**WASHINGTON**

Office of  
Commissioner of  
Internal Revenue.  
Ref. MMt-BGM  
Carbon Steel Company,  
Pittsburgh,  
Pa.

October 4, 1917.

Gentlemen:—

Reference is made to the recent visit to this office of your President, Mr. Charles McKnight, and your attorneys, Messrs. F. D. Faust and H. V. Blaxter, with reference to the tax of \$271,062.62, which was recommended by the

Munitions Agents as being due from your Company under the provisions of Title 3 of the Act of September 8, 1916. This tax is based upon the proposed inclusion in Form 1089 of the income received from contracts entered into by your corporation to furnish the English Government with a certain number of Howitzer shells fitted with nose bushings and driving bands. In view of the fact that the plant was not capable of doing the work called for on such shells, your company furnished the Westinghouse Machine Co. and the Union Switch & Signal Co. with the material from which such shells were to be manufactured. It appears that the steel to be used was manufactured by your corporation and that the copper and other material necessary were purchased by your company and furnished the two above named corporations, with which you had entered into an agreement to perform the necessary work to carry out the contract, and in pursuance of the contract between your company and the Westinghouse and Union Switch & Signal Cos., these contracts were completed and the shells shipped to New York, which was the place of destination under your agreement with the British Government.

Your contention is in effect that in view of the fact that although your corporation had entered into a contract with the British Government to furnish a certain number of shells and had manufactured or purchased the material from which they were to be made, and retained at all times until delivered to the British Government title to the raw material and the finished shells (subject, of course, to any lien that the sub-contractor may have had for labor performed) your company did not in fact manufacture or do any manufacturing work on such shells and for that reason was not liable to the tax imposed by the Act mentioned above.

After careful consideration of the information furnished by your representatives, this office is of the opinion that your company should be considered a manufacturer of the

shells which you guaranteed to furnish and did furnish to the English Government, and therefore the profit arising to your corporation from such completed contract or contracts is properly taxable under the provisions of Title 3 of the Act of September 8, 1916, and consequently the tax of \$271,062.62 recommended will be assessed at any early date and notice of the same being due and payable will be given by the Collector of Internal Revenue of your District.

Respectfully,

(Signed) Daniel C. Roper  
Commissioner

AMW

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## OPINION.

Filed January 14, 1919.

ORR, J.

In pursuance of a stipulation by the parties waiving a trial by jury, this case came on to be tried by the Court without a jury.

Plaintiff claims a right to recover from the Defendant the sum of \$271,062.62, which the Plaintiff charges was illegally assessed against it and illegally exacted from it as a munition manufacturers' tax for the period ending December 31st, 1916. The Plaintiff paid the amount of the tax under protest and thereupon sought relief in the required manner from the Commissioner of Internal Revenue. Relief was refused by the Commissioner of Internal Revenue, and relief must be denied by this Court.

Long before the passage of the Act which first provided for the collection of a tax from the manufacturers of munitions, the plaintiff procured three—several contracts from the British Government for the delivery to the authorized representatives of said Government at New York of 4½" Howitzer shells. The first contract was dated January 26th, 1915, the second September 29th, 1915, the third October 7th, 1915, and together the said contracts provided for the delivery of 548,316 shells.

For the purposes of this case, the said contracts may be considered to be similar in all respects. The contracts did not require that the Steel Company should manufacture the shells contracted for. They contemplated that some portion of the manufacturing might be done by the

Steel Company and that other portions might be done by sub-contractors. However, the Steel Company was bound to deliver the shells to said Government when they were completed and said Government was bound to pay the Steel Company the price fixed in the contract.

The work necessary to complete a shell in accordance with said contracts is as follows:

- (1) Obtaining suitable steel in bar form;
- (2) Cutting or breaking said steel bars to proper length;
- (3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
- (4) The turning of said shell upon a lathe to exact dimensions;
- (5) Closing in one end of said forging to form the nose of the shell;
- (6) Drilling out the base of said shell and the inserting of a base plate;
- (7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
- (8) Cutting a groove around the circumference of said shell and inserting therein a copper driving band and turning said band to the required dimensions;
- (9) Varnishing, greasing and crating the completed shell.

The Plaintiff's plant was not equipped and did not have facilities for doing any of said work except the manufacture of steel suitable for said shells in bar form.

The Plaintiff manufactured suitable steel in its plant in bar form in what is known as mill lengths. That was the beginning of the actual work necessary to fulfill its contracts with the British Government. The other steps in the manufacture of the completed shells were taken by others. The steel bars in mill lengths were sent to another corporation which partially sawed, cut or indented the same at points representing the required lengths of shell forgings, and thereafter redelivered the same to the Plaintiff which then separated them into short lengths which are known in the trade as slugs. The Plaintiff then shipped the said cut bars or slugs to the Westinghouse Machine Company, another corporation, which converted the same, by forging, into hollow shell forgings and annealed the same so that they would be suitable for machine work. Said hollow shell forgings were then subjected to the necessary lathe work by said Westinghouse Machine Company and by the Union Switch and Signal Company, each of said corporations treating approximately equal quantities. They also afterwards closed in one end of the forging to form the nose of the shell and drilled out the base of the shell and inserted a base plate, and as well, also performed the work of threading the nose of the shell and inserting the nose bushing and in said nose bushing, inserting the wooden plug to protect the thread. They also afterwards performed the work of cutting the groove around the circumference of the shell and inserted therein a copper driving band and turned said band to the required dimensions. They also performed the work of varnishing, greasing and crating the completed shell. The said different steps were taken under contracts with the Plaintiff which furnished said sub-contractors with the varnish, grease and cement required, and which also furnished the wooden plugs to protect the threads in the nose of said

shells (which the Plaintiff procured under a contract with a corporation of the State of Maine), fixing screws (which Plaintiff procured from a corporation of Illinois, under contract) and with copper tubing (which Plaintiff procured from a corporation of Pennsylvania, under contract), which copper tubing, the Union Switch and Signal Company cut into rings, which rings were inserted by the Company last named and the Westinghouse Machine Company in appropriate grooves cut in the shells and turned to the required dimensions. The said Westinghouse Machine Company and said Union Switch and Signal Company crated the said shells for export and delivered the same to the Plaintiff at said Companies' works for transportation to New York. The freight upon said shipments was paid by the Plaintiff, who, in turn, delivered the shells to the British Government in New York Harbor. While this work was being done by the said Westinghouse Machine Company and the Union Switch and Signal Company, the British Government maintained inspectors at the plants of said Companies, who examined the shells and approved those properly made in accordance with the specifications in the contracts between the British Government and the Plaintiff.

None of the corporations who performed any of the work or furnished any of the materials entering into the completed shells after the Plaintiff had manufactured the steel in bar form, were in any manner connected with, or controlled by, the Plaintiff, its officers, directors or stockholders, nor in any way could one of them be properly called a subsidiary of the Plaintiff.

For the purpose of keeping separate the profit upon said shell contracts, Plaintiff opened a separate set of books, upon which it credited to an account known as "Special Contract Account," the advance payments received from the British Government on account of said work, and from



said account made all payments to sub-contractors and other payments for expenses connected with said work and credited to said account all money received from the British Government, and when said contracts were completed, transferred to its general books the remaining net profit in said account. As a result of this, the said net profit did not show, in any way, upon the general books of Plaintiff until the profit was thus finally determined. The Plaintiff charged to said Special Contract Account the steel bars in mill lengths manufactured by it at market prices, in the same manner as if Plaintiff had purchased said steel bars in mill lengths in the open market, for the reason that such work was not part of Plaintiff's business. This entry of the market prices was for the purpose of determining the net profit upon the shell contracts. Subsequently, when making its return under protest, under the law providing for munition manufacturers' tax, the Plaintiff at the request of the Department of Internal Revenue, altered the charge for steel bars in mill lengths so as to reflect the same in its return at cost price instead of market price, therefore adding to the amount upon which Plaintiff was taxed the profits shown on Plaintiff's general books upon said steel bars in mill lengths.

|   |              |
|---|--------------|
| The tax upon the increased profit caused<br>by charging steel bars at cost instead of<br>market prices amounted to..... | \$ 15,112.39 |
| The tax upon the balance of profit.....   | 255,950.23   |

---

The total tax paid is.....\$271,062.62

This was paid to the Defendant on December 29th, 1917.

The Plaintiff employed none of its capital in the manufacture of munitions, but it employed the advance payments made by the English Government. It con-

tracted no interest bearing debts or loans to meet the needs of such manufacture.

|   |                |
|---|----------------|
| The gross payments from the British Government constitute the gross amount of income received by it, being a total of .....   | \$8,544,337.51 |
| As against that sum the Plaintiff charged the cost of raw materials .....   | \$1,316,626.28 |
| The running expenses .....  | 717,457.21     |
| It paid to the other corporations for work done and materials furnished .....   | 4,341,753.06   |
| There were no other items to be deducted as allowed by Section 302 of the Act of Congress, because the Plaintiff paid no interest or taxes and sustained no loss or depreciation, or made any apportionment or allowance for amortization, etc. |                |
| The sum of the deductions .....   | 6,375,836.55   |
| The total net profits upon which the tax was computed therefore were .....  | \$2,168,500.96 |

In addition to the foregoing facts, it appears that the Westinghouse Machine Company and the Union Switch and Signal Company, and perhaps others who did work or furnished material under the contracts aforesaid, were assessed for a munition manufacturers' tax upon the profits made by them under their contracts aforesaid with the Plaintiff and severally paid the amounts of the respective assessments.

Plaintiff's methods of keeping its accounts, or of performing its obligations under the contracts with the British Government are not to be deemed as evidence of

any intent to evade its liability for the tax, because such methods were adopted and such course of business was begun prior to the passage of the Act of Congress.

The Act under which the assessment was made was passed September 8th, 1916 and is entitled "An Act to increase the revenue and for other purposes," 39 Statutes 756-780. The particular parts of that Act which determine Plaintiff's liability upon the facts found are set forth under Title III "Munition Manufacturers' Tax" and are as follows:

"Section 301. That every person manufacturing \* \* \* (c) projectiles, shells or torpedoes of any kind \* \* \* shall pay for each taxable year, in addition to the income tax \* \* \* an excise tax of  $12\frac{1}{2}$  per cent. upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States. Provided however, that no person shall pay such tax upon net profits received during the year 1916, derived from the sale and delivery of the articles enumerated in this Section under contracts executed and fully performed by such person prior to January 1st, 1916.  
\* \*

Section 302 specifies the deductions to be allowed severally "from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States. \* \* \*

"Section 307. The tax may be assessed on any person for the time being owning or carrying on the business, or on any person acting as agent for that person in carrying on the business, or where a business has ceased, on the person who owned or carried on the business or acted as agent in carrying on the business immediately before the time at which the business ceased."

If the excise tax provided for in the foregoing sections be a tax imposed upon manufacturers of munitions, can it be said that the Plaintiff escaped liability under the facts found in this case? The Plaintiff, by its engagement with the British Government, undertook to manufacture, or have others manufacture, the shells. It began the manufacture of the shells to the extent of making the round bars in mill lengths. The steel in said round bars was the Plaintiff's property and remained the Plaintiff's property during all succeeding processes and until the Plaintiff delivered the finished product to the British Government. If this Court would hold that the Plaintiff ceased to be a manufacturer when it had finished the manufacture of the round bars in mill lengths out of which the shells were made, although it retained title thereto during the processes performed by others, the construction of the law would be too illiberal and would tend to defeat what plainly appears to be the purposes of Congress. The tax, however, is not upon the manufacturer; it is upon the entire net profits actually received or accrued from the **sale or disposition of such articles.**

The liability for the tax is not expressly limited to the person manufacturing the munitions. It may be assessed on any person for the time being owning or carrying on a business, or on any person acting as agent for such a one. In the present case, the business was carried on by the Carbon Steel Company. In fact the entire business of furnishing the shells to the British Government, in pursuance of the several contracts, was carried on by the Plaintiff. The making of the round bars was continuing long after the first slugs were delivered to the other corporations. The clerk (or clerks) of the Plaintiff was stationed at the works of the Westinghouse Machine Company and the Union Switch and Signal Company for the purpose of checking up the work as it progressed. The case is not made any different because those companies paid the assessment upon their profits for making parts of the shells. The Plaintiff was not charged in the assessment

against it with any of the profits made by its sub-contractors. The tax paid by it was a tax assessed upon its profits only. In every aspect of the case, the Plaintiff appears to have been liable to the payment of the tax. Therefore the Plaintiff is not entitled to recover and judgment will be entered in favor of the Defendant.

And now, to wit: January 14th, 1919, judgment is directed to be entered in favor of the Defendant and against the Plaintiff.

CHAS. P. ORR,  
United States District Judge.

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### ORDER AND JUDGMENT.

And now, to-wit: January 14th, 1919, judgment is directed to be entered in favor of the Defendant and against the Plaintiff.

CHAS. P. ORR,  
United States District Judge.

January 14, 1919, Pursuant to Order of Court, judgment is hereby entered in favor of the Defendant and against the Plaintiff.

J. WOOD CLARK,  
Clerk.

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### EXCEPTION.

Filed February 8th, 1919.

And now, to wit, this 8th day of February, 1919, comes the plaintiff by its counsel and excepts to the order of Court directing the Clerk to enter judgment in favor of the defendant.

H. V. BLAXTER,  
Attorney for Plaintiff.

Eo die, exception noted and bill sealed.

CHAS. P. ORR,  
United States District Judge.

**ASSIGNMENTS OF ERROR.**

Filed February 14th, 1919.

And now, to-wit, this 14th day of February, 1919, comes the Carbon Steel Company, a corporation, plaintiff in the above entitled case, and in connection with its petition for a Writ of Error makes the following Assignments of Error:

**FIRST:** The Court erred in using the following language in the opinion which it filed, to-wit:

"They (the contracts between plaintiff and the British Government) contemplated that some portion of the manufacturing might be done by the Steel Company and that other portions might be done by sub-contractors."

**SECOND:** The Court erred in using the following language in the opinion which it filed, to-wit:

"If the excise tax provided for in the foregoing sections be a tax imposed upon manufacturers of munitions, can it be said that plaintiff escaped liability under the facts found in this case?"

**THIRD:** The Court erred in using the following language in the opinion which it filed, to-wit:

"It (plaintiff) began the manufacture of the shells to the extent of making the round bars in mill lengths."

**FOURTH:** The Court erred in using the following language in the opinion which it filed, to-wit:

"If this Court would hold that the plaintiff ceased to be a manufacturer when it finished the manufacture of the round bars in mill length out of which the shells were made, although it retained title thereto during the processes performed by others, the construction of the law would be too illiberal and would tend to defeat what plainly appears to be the intent of Congress. The tax, however, is not upon the manufacturer; it is upon the entire net profits actually received or accrued from the sale or disposition of such articles."

FIFTH: The Court erred in using the following language in the opinion which it filed, to-wit:

"The liability for the tax is not expressly limited to the persons manufacturing the munitions. It may be assessed on any person for the time being owning or carrying on a business or on any person acting as agent for such a one. In the present case the business was carried on by the Carbon Steel Company. In fact, the entire business of furnishing the shells to the British Government, in pursuance to the several contracts, was carried on by the plaintiff."

SIXTH: The Court erred in using the following language in the opinion which it filed, to-wit:

"The case is not made any different because these companies (the sub-contractors) paid the assessment upon their profits for making part of the shells."

SEVENTH: The Court erred in using the following language in the opinion which it filed, to-wit:

"In the every aspect of the case the plaintiff appears to have been liable to the payment of the tax; therefore, the plaintiff is not entitled to recover and a judgment will be entered in favor of the defendant."

EIGHTH: The Court erred in holding that plaintiff was liable for a Munition Manufacturers' Tax for the period ending December 31st, 1916, under Section 301 of the Act of September 8th, 1916.

NINTH: The Court erred in making the following order, to-wit:

"And now, to-wit, January 14, 1919, judgment is directed to be entered in favor of the defendant and against the plaintiff.

CHARLES P. ORR,  
United States District Judge."

CARBON STEEL COMPANY  
Plaintiff in Error.

By H. V. BLAXTER,  
Its Attorney.

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### NOTICE RE CONTENTS OF RECORD.

Filed February 14th, 1919.

J. WOOD CLARK, Clerk.

The parties in interest are hereby notified that Plaintiff above—Plaintiff in Error, will in the Record on Appeal incorporate the following:

All matters specified and required by Rule of the Circuit Court of Appeals for the Third Circuit.

H. V. BLAXTER,  
February 14th, 1919. Attorney for Plaintiff  
in Error.

And now, to-wit: February 14th, 1919, service of the above accepted and objection waived, including requirement of five days' notice.

B. B. MCGINNIS,  
Attorney for Defendant.



**BILL OF EXCEPTIONS.**

Filed February 14th, 1919.

Be it remembered, that at the above number and term, came into this Court, Carbon Steel Company, a corporation organized and existing under the laws of the State of West Virginia, plaintiff, and filed its statement of claim against C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania on the 6th day of February, 1918 (see Statement of Claim), and the said defendant filed his affidavit of defense to said statement of claim on the 20th day of March, 1918 (see Affidavit of Defense); and thereupon issue was duly joined and there after, to-wit, at a session of this Court held on the 7th day of October, 1918, the said issue came on to be tried before the Honorable Charles P. Orr, District Judge, without a jury (see Stipulation waiving trial by jury), at which time appeared the plaintiff and defendant, with their respective attorneys, whereupon the witnesses whose names are set forth in the testimony, which testimony is made part of this Bill of Exceptions (see Testimony), were called and duly sworn and testified as in said testimony set forth, and on the 7th day of October, 1918, the plaintiff filed a request for findings of Fact and Conclusions of Law (see Request for Findings of Fact and Conclusions of Law), and on the 14th day of January, 1919, the Court filed its opinion, including therein its Conclusions of Fact and Law, in favor of defendant (see Opinion of Court), and in said opinion directed that judgment be entered in favor of defendant and against the plaintiff, and pursuant thereto, on the 14th day of January, 1919, the clerk entered judgment in favor of defendant and against the plaintiff (see judgment), and upon the 8th day of February, 1919, the plaintiff excepted to the said Order of Court (see Exceptions), which exception was, upon said date, duly noted and bill sealed.

Whereupon, on the 14th day of February, 1919, the plaintiff filed its petition for a Writ of Error and presented said Petition, with its Assignments of Error, and upon the said day said Writ was dully allowed and issued and the citation was thereupon issued and served upon counsel for the defendant, and thereupon the aforesaid Judge did to this Bill of Exceptions, in pursuance of the request of plaintiff in error, and of the law, put his seal this 14th day of February, 1919.

CHAS. P. ORR,

Judge for the United States District Court for the Western District of Pennsylvania.

The foregoing Bill of Exceptions presented to me and found correct.

B. B. MCGINNIS,

Attorney for Defendant.

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**CERTIFICATE.**

Western District of Pennsylvania, ss:

I, J. Wood Clark, Clerk, of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record of proceedings ordered to be printed in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this.....day of March, 1919.

.....  
Clerk.

In the United States Circuit Court of Appeals for the Third  
Circuit, March Term, 1919.

No. 2438. (List No. 21.)

CARBON STEEL COMPANY, Plaintiff in Error,

v.

C. G. LEWELLYN, Collector of Internal Revenue for the  
Twenty-third District of Pennsylvania, Defendant in  
Error.

And afterwards, to wit, on the twenty-eighth day of March, 1919, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable Victor B. Woolley, Circuit Judges, and Honorable Thomas G. Haight, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the ninth day of June, 1919, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third  
Circuit, March Term, 1919.

No. 2438.

CARBON STEEL COMPANY, Plaintiff in Error,

v.

C. G. LEWELLYN, Collector of Internal Revenue for the  
Twenty-third District of Pennsylvania, Defendant in  
Error.

In Error to the District Court of the United States for the  
Western District of Pennsylvania.

March Term, 1919.

No. 2465.

WORTH BROTHERS COMPANY, Plaintiff in Error,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the  
First District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the  
Eastern District of Pennsylvania.

March Term, 1919.

No. 2462.

C. G. LEWELLYN, Collector of Internal Revenue for the  
Twenty-third District of Pennsylvania, Plaintiff in  
Error.

v.

FORGED STEEL WHEEL COMPANY, Defendant in Error.

In Error to the District Court of the United States for the  
Western District of Pennsylvania.

*Opinion of the Court.*

(Filed June 9, 1919.)

Before Buffington, Woolley and Haight, Circuit Judges.

*BUFFINGTON, Circuit Judge:*

These cases concern the construction and application of Section 301 of Title III of the Act of Congress of September 8, 1916, 39 St. 756, 780, which provides: "That every person manufacturing projectiles, shells, \* \* \* or (f) any part of any of the articles mentioned in (b), (c), (d), or (e) \* \* \* shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

An examination of the whole act shows it imposes an excise tax on persons manufacturing either certain mentioned war munitions or appliances, or on persons manufacturing any part of any of the said mentioned articles. Therefore, two questions naturally arise: First, who shall be deemed manufacturers of the mentioned articles, and second, who shall be deemed manufacturers of any part of the articles mentioned.

In ascertaining the true construction of the law and thus carrying out its purpose, this Court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply

what was done. When Congress took up this matter the situation was that during the two preceding years of the world war, great quantities of war munitions and war accessories had been manufactured in this country and sold to the Allied Governments at high and abnormal prices, owing to the fact that they were abnormal products and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation. That the tax was abnormal and its imposition temporary, was evidenced by the provision: "(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended."

In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. It will thus be seen that whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. And since all that were thus sent abroad were manufactured here, indeed the act is expressly directed to "such articles manufactured within the United States," and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject-matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured and to impose an excise tax on the person who manufactured such articles or "any part of any of the articles mentioned," and to fix such tax

by "the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the case, it follows that the pertinent subjects of inquiry where the act is to be applied is first to ascertain whether the war munitions or war accessories, were articles "manufactured within the United States"; second, if they were so manufactured within the United States, who manufactured such article and if so what were the "net profits actually received or accrued \* \* \* from the sale or disposition of such articles"; third, if they were so manufactured within the United States, who manufactured any part of such article and if so what were the "net profits actually received or accrued \* \* \* from the sale or disposition of such articles."

In thus applying the broad, inclusive terms of the statute, "every person manufacturing \* \* \* shells \* \* \* or any part of any of the articles mentioned," along the lines of inquiry above indicated, it is clear that it must have been in the mind of Congress that complex questions would arise in specific cases and that these difficulties of specific application must be solved on some general principles of the act. Turning to the act, we think the broad purpose of Congress is clear to select as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So also the articles that in their completed, unitary form were adapted solely for war purposes might have parts which in and by themselves, could be also used and would naturally be used for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used,

but remained in the channels of normal commerce and use? Clearly not; first, because such articles or parts of articles, when sold in ordinary commerce, did not earn war profits, and second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such war-like agencies as gun powder, explosives, caps and the like, by the act providing that such of said articles as are "used for industrial purposes" are excepted. It would therefore seem that the broad general purpose was to include in the field of taxation, all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles.

Applying these general principles and lines of construction to the act, and in its application to the individual cases arising under it, let us turn to the facts of the three cases here involved, viz.: Carbon Steel Company v. Lewellyn, Collector; Worth Brothers Company v. Lederer, Collector, and Lewellyn, Collector, v. Forged Steel Wheel Company.

In the first case it appears the Carbon Steel Company made three substantially similar contracts with the British Government, whereby in one contract it agreed "to manufacture 75,000 4.5" shells Lyddite, \* \* \* suitably packed for export and delivered free alongside steamer New York. \* \* \* Inspection will be carried out at Contractor's works by an inspector or inspectors appointed by the Secretary of State."

In a second contract, the Steel Company contracted to sell, and the British Government to buy, 425,000 shells. The contract provided that in case of "the seller being able to manufacture from its present plants more than 425,000 of the said shells before June 30, 1916, the buyer will accept and pay for any such additional shells up to 175,000." Payment was to be made on "invoices and certificates of inspection, executed by an inspector of the buyer, certifying that



such shells have been manufactured and have passed all factory inspection and shop tests with respect thereof.

\* \* \* It is understood and agreed that the buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for, and their component parts, are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivered, and that the seller or its sub-contractors, shall furnish all facilities required by such inspector for this purpose. The seller, at its expense, shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for, and their component part, including all gauges required by the inspectors of the buyer."

The third contract was substantially of like import. From the contracts, it will be seen that the general purpose of the Carbon Steel Company was to make, or have made—and making is manufacturing—and to deliver in the United States, shells contemplated by the act.

In carrying out the contracts, the shells were made in the United States; they were accepted by the British Government, and the contract price was paid therefor by the Government to the Steel Company, and, as a result, there accrued to the Steel Company "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the fact, it would seem the case falls within the general scope of the act unless the Steel Company can show that in the manufacture of the shells it contracted to have manufactured, it did not manufacture the shell as a whole or any part thereof. Is such the fact?

Now, what was done in this case was this: The making of a shell consisted of nine operations, as follows:

- "(1) Obtaining suitable steel in bar form;
- "(2) Cutting or breaking said steel bars to proper length;

- “(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;
- “(4) The turning of said shell upon a lathe to exact dimensions;
- “(5) Closing in one end of said forging to form the nose of the shell;
- “(6) Drilling out the case of said shell and the inserting of a base plate;
- “(7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;
- “(8) Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to required dimensions;
- “(9) Varnishing, greasing and crating of the completed shell.”

But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel made in this initial step. This foundation step the Steel Company effected in its own plant, and the relative importance of this first step, compared with the remaining eight, is shown by the fact that the bare material and running expenses involved in this step amounted to somewhat over two millions of dollars as compared with some four millions three hundred thousand paid to sub-contractors as their expenditures for work, material and profits in the other eight steps. The steel thus made in the first step, was the property of the Steel Company, it remained its property while the sub-contractors completed the other eight steps, that was finally transferred by the Steel Company to the British Government. Moreover, during such eight steps every operation of these sub-contractors on the original steel was followed up by employees of the Steel Company, who checked the work as it progressed, and by

virtue of the contracts to which we have referred, it was subjected to the inspection of the British Government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company.

To us it is clear that if the law here involved were a draft or conscription law, and that from its operation there was exempted from draft "every person manufacturing \* \* \* shells \* \* \* or any part of the articles mentioned," that all the workmen of the Steel Company engaged in making shells here involved would fall within said exception because they—and therefore the company—were manufacturing shells. We therefore conclude that by virtue of the Steel Company's own work in the first step and by virtue of its effecting and controlling the other eight steps through its sub-agents, the Steel Company was manufacturing shells, and therefore subject to the tax imposed by this statute. It follows that the judgment of the Court below, which was that the Steel Company could not recover from the Government the tax it had paid, must be affirmed.

In the case of Worth Brothers Company v. Lederer, Collector, coming from the Eastern District of Pennsylvania, the pertinent facts are: The Midvale Steel Company and Worth Brothers Company are co-related to each other in that both companies are owned by the Midvale Steel and Ordnance Company. The Midvale Steel Company contracted with the French Government to sell and deliver about 400,000 high explosive shells to be made under accompanying specifications and under inspection of the Government as the work progressed. The said company was equipped to completely manufacture shells and in fact did, at its own plants so completely manufacture large quantities

of the shells thus contracted for. Later it contracted with Worth Brothers Company to furnish the steel and complete six of the initial processes of the shell making which six steps constituted about forty per cent of the cost of the shells. Thereafter the remaining twenty-nine steps of the shell-making process, and which constituted sixty per cent of the cost, was done by the Midvale Steel Company itself. Did the work thus done by the Worth Brothers Company on these six initial steps bring it within the provisions of the act as being a "person manufacturing \* \* \* shells \* \* \* or any part of any of the articles mentioned"?

Turning to the facts we note that the six stages of shell manufacture done by Worth Brothers Company were, as found by the Court below:

- "(1) Smelting the ore in the blast furnace into pig iron without, however, running it into the moulds which would form what are commercially known as pigs.
- "(2) In its molten state transferring it with a ladle into an open hearth furnace where it was converted into steel and tapped out of the furnace and conveyed into moulds in the form of ingots.
- "(3) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.
- "(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter and weight to produce the required shell forging. At this point the French inspectors inspected each individual billet to determine whether there were defects in the steel such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside di-

- iameter of the shell forging to be produced and approximately one-third of its length.
- "(5) The billet was then taken to the forge shop, heated, from two to three hours in a continuous furnace, and placed in the container or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal being heated to about 2100 degrees is viscous so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.
- "(6) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company."

It will, of course, be noted that all six steps were progressive advances toward the chemical constituents, the shape and the dimension required by, and essential to, the manufacture of shells in compliance with the contract. And while, in the first three steps, the work was of such a character that the product made thereby could, up to the fourth stage, have been diverted to general commercial needs, yet as noted, the work done in said three steps was actually done with a view to contract needs and shell requirements. With the fourth step, the contract shell inspection of the French Government began and in the fifth step the fluid metal was taken, from the possibility of use for general commercial purposes, by a hollow-cylindrical forging process which restricted the steel to the field of use for shells. By the sixth step, this hollow-cylindrical forging was drawn to a length, and to an inside and outside diameter which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine pro-

gressive steps which, with the six of the Worth Brothers Company, were required by the contract to complete the manufactured shell of the contract. From this it will be seen the Worth Brothers Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Brothers Company, in accordance with the contract, was shell work distinctively, for even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Brothers Company—forty per cent of the cost—and the character of that work—segregating the steel from the general field of commercial use and narrowing it to shell use—made its work such as was aptly described by the act as being “manufacturing \* \* \* shells \* \* \* of any kind, loaded or unloaded \* \* \* or any part” of a shell. Indeed, to say that when Worth Brothers Company made the steel which constituted the shell and when by pressing a cavity in the steel they made an outer rim or shell which gave it such shape as committed and restricted it to shell use, to say that Worth Brothers Company when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells or manufacturing any part of shells, is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute. The statute shows on its face that Congress contemplated that cases would arise where parts of the articles named would, if not indeed must, be

made by joint co-operation. Indeed the found facts in this case show that not more than two or three plants in the whole country were equipped to make a complete shell. Shell making in this country had been going on for the two preceding years. It was well known that the shells made for the Allies in the United States were manufactured by the joint work of different plants. In the light of these facts, it would seem that a construction of the act which narrowed its application to the case of a plant that did the entire work, would defeat the whole purpose of Congress which presumably was to subject the profits of all engaged in the manufacture of shells or any part thereof, to this excise tax. Such being the case, we hold the tax imposed on Worth Brothers Company was justly laid and the judgment of the Court below which held the company could not recover the tax from the Government was right and should be affirmed.

We next turn to the case of the Forged Steel Wheel Company against Lewellyn, Collector. From the proofs it appears the British Government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement and inspection of the said Government. To fulfill such shell contract the contractor made sub-contracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor, rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made or bought in the market, the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into eighteen-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by drawing it through three successive rings of a hydraulic

press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape and length, from which to make, to the British Government standards, the high explosive projectiles contracted for. The weight of such shell forms was about one hundred and seventy pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it, was required to dress, bore and machine it down to seventy-seven pounds, this required some twenty-seven distinct and separate processes. Such being the facts, did the work of the Forged Steel Wheel Company noted above make it "a person manufacturing \* \* \* shells \* \* \* or any part of" a shell? The Court below held it did not, and such holding constitutes the question involved in this case.

In reaching that conclusion, the lower Court construed the act as though it read "a person manufacturing \* \* \* shells \* \* \* or any component, completed, part of" a shell, in that regard saying: "I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the completed things specifically designated in (b), (c), (d) and (e), and on those persons who were manufacturing and selling at a profit any completed part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the completed thing."

The Court was also influenced, first, by the fact that, as stated in its opinion, "The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body projecting slightly so as to engage the rifling of the



gun. This gives the shell its rotary motion necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed and designed not only individually but with reference to each other, when assembled together, constitute a high explosive shell."

Starting with the unquestioned premise that a completed shell was made up of assembling six separate and complete parts, the Court assumed that the purpose of Congress was not to tax anyone but (a) the manufacturer of a completed shell, or (b) the maker of a completed part of a shell; and that because the shell form the Forged Steel Wheel Company made was not a completed part of a shell, that it was therefore not subject to the excise tax imposed by the statute. Now, it is manifest that standing alone the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words "any part" to the restricted, specific, qualified term "any completed part." It follows, therefore, that ground for inferring such intent in the mind of Congress must arise from something apart from the language of the act itself. Such intent the Court below found in certain decisions of the Federal Courts involving tariff laws which exempted from duty "manufactured" articles. And these decisions holding what were "manufactured" articles in tariff legislation the Court below held Congress must have had in mind in passing this excise law saying, "We must assume that Congress well knew the distinction between a completely manufactured thing, or part of a thing, and a partial manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or

parts thereof, and others have levied a tax upon a partial manufacture."

On the other hand, in the Worth Brothers Company case, decided above, the Court below held these tariff decisions did not affect the construction of this statute, saying: "The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material and what constitutes a wholly manufactured article dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed. I cannot perceive that these cases have any bearing upon the question arising in this case unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture whether engaged in manufacturing to completion or engaged in any part of such manufacturing."

We are of opinion the latter Court was right in so regarding these customs decisions, for when the objects which Congress had in view in framing the Customs Acts and this excise law, are considered, it will be seen they are wholly different. In Customs law the primary object of Congress in their passage was to protect domestic against foreign labor, and to effectuate this object the customs duties were so imposed that where all the work necessary to be done upon the imported article to fit it for use in the United States had been done abroad, such article or the part so completed and fitted for use, was, to carry out that primary intent, held to be a manufactured article, or a manufactured part, and there-

fore subjected to the duty. On the other hand, if work upon the imported article, or imported part, before it was fit for use remained to be done in this country, such article or part was held not to be a manufactured article within the scope of the law, and therefore not subject to the tariff duty. The necessity of bearing this primary purpose in view in construing Customs Acts was set forth in *Tide Water Oil Company v. United States*, 171 U. S. 216, where the Supreme Court, referring to a customs act, said: "The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind." Indeed, it is, on the one hand, this presence of work already done which has fitted an object for use, or it is on the other hand, a residue of work necessary to fit the object for use, which brings the article within or without the description of the manufactured article of the tariff law. This is well summarized in *Tide Water Oil Company v. United States*, 171 U. S. 216, where it is said: "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct

process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming material of the next rank.”

From these decisions it will be seen that these tariff laws deal with manufactured articles, from the standpoint of protecting domestic labor, and the imposition of import duties is an incident in effectuating that main purpose.

But in the excise law in question, Congress is dealing with the imposing of taxes as the main object and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial.

Indeed, from a study of customs decisions, it will be seen that from the basic standpoint of protecting domestic labor, the imposition of import duties is a mere incident or means to effectuating such main purpose, and the term “manufactured article” must therefore be construed and applied with such purpose in view. It follows, therefore, that in such case the quantum of labor done or left to be done, is all-important in the practical administration of customs laws. On the other hand, the whole purpose of excise law is to produce revenue and it is the fact of manufacture and not the quantum of labor that is the determining factor. Indeed, the object of the statute, viz., the raising of revenue, may be reached where a minimum of labor is used in the manufacturing taxed, for as the net profit is the basis of taxation, it follows that the smaller the relative amount expended in physical labor in a manufacturing operation, the greater may be the relative net profit which determines the tax. Moreover, it will be apparent that a manufacturing operation in which much labor has been used, may not involve any net profits while another involving much less labor may result in taxable net profits. It will therefore be apparent

that in an excise tax on manufacturing measured by net profits, the crucial question is not the quantum of the manufacture measured by steps but the fact of manufacture resulting in profits. Gauging the operations of the Forged Steel Wheel Company by this standard, it would seem clear that in doing the basic shell work it did that company was, in the broad and general sense of fulfilling this contract, a "person manufacturing \* \* \* shells \* \* \*," and by virtue of the particular manufacturing stages it completed in the making of such shells, the company fell within the class of a "person manufacturing \* \* \* any part of any of the articles mentioned." Such being the case, the excise tax was lawfully laid on the "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." It follows, therefore, the judgment recovered by it below was erroneous and must be reversed.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2438. (List No. 21.)

CARBON STEEL COMPANY, Plaintiff in Error,

v.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

*Order Affirming Judgment.*

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

JOS. BUFFINGTON,

*Circuit Judge.*

Philadelphia, June 9, 1919.

(Endorsed: 2438. Order Affirming Judgment. Received & Filed Jun- 9—1919. Saunders Lewis, Jr., Clerk.)

*Clerk's Certificate.*

UNITED STATES OF AMERICA,

*Eastern District of Pennsylvania,*

*Third Judicial District, set:*

I, William P. Rowland, Deputy Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of Carbon Steel Company, plaintiff in error, v. C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, defendant in error, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 24th day of July in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. P. ROWLAND,

*Deputy Clerk of the U. S. Circuit  
Court of Appeals, Third Circuit.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Carbon Steel Company is plaintiff in error, and C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, is defendant in error, No. 2438, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,  
*Clerk of the Supreme Court  
of the United States.*

[Endorsed:] File No. 27,290. Supreme Court of the United States. No. 535. October Term, 1919. Carbon Steel Company vs. C. G. Lewellyn, Collector of Internal Revenue, etc. Writ of Certiorari. Received Nov. 1, 1919. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third  
Circuit, October Term, 1919.

No. 535.

CARBON STEEL COMPANY

v.

C. G. LEWELLYN, Collector of Internal Revenue, &c.

*Stipulation.*

It is hereby stipulated by and between all the parties to this suit that the certified Transcript of Record heretofore filed in the office of the Clerk of the Supreme Court of the United States shall be taken as a return to the writ of certiorari issued by the Court on the 24th day of October, A. D. 1919.

ALEX. C. KING,

*Solicitor General.*

WM. L. FRIERSON,

*Assistant Attorney General.*

FREDERICK DeC. FAUST,

H. V. BLAXTER,

*Attorneys for Carbon Steel Company.*

Endorsements: 2462. Stipulation of Counsel for Return to Writ of Certiorari. Received & Filed Nov. 1, 1919. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,

*Eastern District of Pennsylvania,*

*Third Judicial District, set:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify



the foregoing to be true and faithful copy of the original Stipulation of Counsel for Return to Writ of Certiorari in the case of Carbon Steel Company v. C. G. Lewellyn, Collector of Internal Revenue, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this first day of November, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court  
of Appeals, Third Circuit.*

[Endorsed:] File No. 27,290. Supreme Court U. S. October Term, 1919. Term No. 535. Carbon Steel Company, Petitioner, vs. C. G. Lewellyn, Collector of Internal Revenue, etc. Writ of Certiorari and Return. Filed November 3, 1919.

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

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|                                       |   |          |
|---------------------------------------|---|----------|
| CARBON STEEL COMPANY, PETITIONER,     | } | No. 535. |
| v.                                    |   |          |
| C. G. LEWELLYN, COLLECTOR OF INTERNAL |   |          |
| Revenue for the Twenty-third District |   |          |
| of Pennsylvania.                      |   |          |

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.*

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## **MOTION OF RESPONDENT TO ADVANCE.**

Comes now the Solicitor General on behalf of respondent herein and respectfully moves the advancement of the above-entitled cause for argument during the present term.

The case involves the construction and application of Section 301 of the so-called Munitions Manufacturer's Tax Act of September 8, 1916 (39 Stat. 780, 781), which provided, among other things, that persons manufacturing "shells" or "any part" thereof should pay an excise tax of 12½ per cent upon the net profits derived during the taxable year from the sale or disposition of such articles manufactured in the United States. Petitioner was under

contract with the British Government to supply a large number of shells. Part of the work, such as the manufacture of steel in bar form, was performed at its own mills. Other parts of the work were performed by other companies under contract with petitioner, which exercised general supervision over the various remaining stages of manufacture. The question arises whether petitioner was a manufacturer of "shells" or "any part" thereof within the meaning of the Act. Suit was instituted by petitioner to secure a refund of taxes levied upon it under said section and paid by it under protest. Judgment was rendered against petitioner in the District Court, which was affirmed in the Circuit Court of Appeals.

Numerous claims, aggregating several millions of dollars, for refund of taxes imposed under said section 301 are now pending in the Federal Courts and before the Commissioner of Internal Revenue. Several of the District Courts of the United States have construed said section and conflicting decisions have resulted. It is important, therefore, that an early decision be had in this case.

Counsel for petitioner concur and join in the request for the advancement of this cause.

ALEX. C. KING,  
*Solicitor General.*

NOVEMBER, 1919.

○

IN THE  
**Supreme Court of the United States**

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No. ———, October Term, 1919.

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CARBON STEEL COMPANY, a corporation, organized and  
existing under the laws of the State of West Virginia,  
*Petitioner,*

*vs.*

C. G. LEWELLYN, Collector of Internal Revenue for the  
23rd District of Pennsylvania, *Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE THIRD CIRCUIT AND  
BRIEF IN SUPPORT THEREOF.

*To the Honorable, the Supreme Court of the United States:*

The Carbon Steel Company prays for a writ of certi-  
orari to review the judgment of the United States Cir-  
cuit Court of Appeals for the Third Circuit in the above  
entitled cause, and in support thereof respectfully sets  
forth:

STATUTE IN QUESTION.

This case involves the construction and application of  
Section 301 of Title III of the Act of Congress of Sep-

tember 8, 1916, 38 St. 756, 780, levying what is known as the Munition Manufacturers' Tax. That Act provides in part:

"That every person manufacturing shells \* \* \* or any part of any of the articles mentioned in (b), (c), (d) or (e) \* \* \* shall pay for each taxable year, in addition to the Income Tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued in such year from the sale or disposition of such articles manufactured within the United States."

#### PARTICULAR QUESTION INVOLVED.

The particular question involved in this case is whether the Carbon Steel Company, petitioner herein, is a "person manufacturing shells," as referred to in the above quotation, or, stated in another way, is the company that supplies steel in the form of commercial bars a manufacturer of munitions made from that steel?

#### STATEMENT.

The Carbon Steel Company, the petitioner, is a corporation of the State of West Virginia, having its plant in the City of Pittsburgh, Pennsylvania, where it is and has been for many years engaged in the manufacture of commercial steel.

During the year 1915 and about a year before the Munition Manufacturers' Tax Law referred to was passed, the Carbon Steel Company entered into three substantially similar contracts with the British Government for the supply of 4½-inch high-explosive shells. These contracts appear in the record, pages 42 to 56. The British Government knew that the Car-

bon Steel Company was not equipped for making and had never made shells of any kind. The intention and understanding was, that the Carbon Steel Company would only make the steel required for the shells and that it would sub-contract to other companies the actual manufacture of the shells.

This understanding was strictly observed in the performance of the contracts. The Carbon Steel Company made and supplied the necessary steel in the ordinary commercial form to other independent corporations as sub-contractors who thereafter did all the actual work of manufacture of shells and shipped the shells upon completion direct from their respective plants to the British Government.

All of the contracts of the Carbon Steel Company with the British Government were carried out in a similar manner, viz: the Carbon Steel Company manufactured the necessary steel in the form of long bars, and other corporations, chiefly the Westinghouse Machine Company and the Union Switch & Signal Company, did all the work above described, and the finished shells were shipped direct from their plants to the British Government at New York. On arrival at New York, the British Government paid the Carbon Steel Company, its contract price, and the Carbon Steel Company in turn paid its sub-contractors for making the shells. As a result of this, the sub-contractors made a profit upon doing the work of manufacturing the shells, and the Carbon Steel Company made a further profit in handling the business and supplying the steel.

The Government in due course thereafter assessed and collected its munition manufacturers' tax from the sub-contractors, based upon the number of shells manufactured by each.

The work of making a shell is quite an involved and delicate process, but, stated in its simplest terms, consists of making out of a steel bar a hollow shell forging, approximating roughly the length and diameter of the finished shell. One end of the forging is then closed in, forming the nose of the shell, and the hollow shell is turned upon a lathe to exact dimensions. The base of the shell is sometimes drilled out and a base plate inserted, and all shells go through an elaborate process to attach a copper band known as the "driving band." Bushings are inserted in the nose of the shell and the completed article is varnished, greased and packed in a special crate for transportation.

The sub-contracts, under which these companies did all the steps to manufacture the shells, appear in the record commencing on page 56.

These contracts show that every step connected in any way with the manufacture of the shells in question was taken by the sub-contractors of the Carbon Steel Company. All that the Carbon Steel Company did, was to make and supply to its sub-contractors the necessary steel and other raw material.

The Westinghouse Machine Company and the Union Switch and Signal Company were the chief sub-contractors and did all the work of making the shells in question. These companies were separate and independent corporations and, under the terms of their sub-contracts, were independent contractors, not agents of the Carbon Steel Company.

In the summer of 1917, long after the assessment and collection of the tax from the sub-contractors, the Carbon Steel Company, after an examination of its books by an agent of the Department of Internal Revenue, was assessed a Munition Manufacturers' Tax upon the entire profit made

by it in the above recited transaction. This tax, in the amount of \$271,062.62, was paid under protest and suit brought in the District Court of the United States for the Western District of Pennsylvania for the recovery thereof. The case was tried by that Court without a jury, the facts being set forth in a stipulation of counsel. This stipulation appears in the record, page 84. The District Court entered judgment in favor of the defendant.

On appeal by plaintiff, petitioner herein, to the United States Court of Appeals for the Third Circuit, that Court, in ~~its~~<sup>an</sup> opinion filed June 9, 1919, sustained the judgment of the District Court.

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#### REASONS FOR THE ALLOWANCE OF THE WRIT.

(1) The case is one of public importance as the decision of the Circuit Court of Appeals in this case and in the case of *Lewellyn v. Forged Steel Wheel Company and Worth Brothers Company v. Lederer*, all decided at the same time and covered in one opinion, raised the two most important questions under the Act, first what is the meaning and application of the word "manufacturer" as used in the Act; and second, what is meant by a "part" of the munitions therein designated. Many other cases or claims are pending under this Act, the final action in which will, we think, be controlled by the decision of this Court upon these two questions.

(2) The construction put upon the Act by the Circuit of Appeals imposes a tax upon two separate and independent corporations as the manufacturer of the same munition in its entirety.

(3) The effect of this decision is to create confusion as



to the meaning and application of the word "manufacturer" as used by Congress in Acts levying taxes.

(4) This decision makes ownership of raw material a controlling test of whether a corporation is engaged in manufacture.

(5) This decision offends against the settled principle of construction of this Court, that a tax is never imposed under doubtful language.

WHEREFORE, the foregoing matters being considered, your petitioner prays that the Court will grant its Writ of *Certiorari* directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify a full and complete transcript of the record in the above entitled cause to this Court for review, and that this Court will thereupon proceed to correct the errors complained of, reverse the judgment for the respondent and remand the cause and give your petitioner such other and further relief as the nature of the case may require and to the Court may seem proper in the premises.

And your petitioner will ever pray.

CARBON STEEL COMPANY,  
By FREDERICK DE C. FAUST,  
H. V. BLAXTER,  
*Its Attorneys.*

#### BRIEF IN SUPPORT OF PETITION.

The United States Circuit Court of Appeals, in affirming the judgment of the District Court, used the following language. (Record, page 136.)

"But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel

made in this initial step. \* \* \* The steel thus made in the first step, was the property of the Steel Company, it remained its property while the sub-contractors completed the other eight steps, that was finally transferred by the Steel Company to the British Government. Moreover, during such eight steps every operation of these sub-contractors on the original steel was followed up by employees of the Steel Company, who checked the work as it progressed, and by virtue of the contracts to which we have referred, it was subjected to the inspection of the British Government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company."

The tax, we submit, is laid only upon the manufacturer of a shell or a part of a shell, not upon a dealer, broker or purchaser. This decision of the Circuit Court of Appeals must therefore mean that the Carbon Steel Company, the petitioner, either made the completed shell or a part of the shell.

There is no question that the making of steel bars is not the making of a part of the shell. It was never so urged by counsel for the Government, and there are at the present time petitions for *certiorari* in two cases, viz: *Worth Brothers Company v. Lederer*, and *C. G. Lewellyn, Collector, v. Forged Steel Wheel Company*, in which the question at issue is whether a hollow shell forging, that is, a steel bar that has been converted into the rough shape of a shell, is a part of a shell. The Department of Internal Revenue has never even claimed that round bars are parts of shells. Its interpretation of the

word "part" is substantially that the article must be relatively complete within itself and by reason of some peculiar characteristic have lost its identity as a commercial commodity and cannot, without further treatment be used for any purpose other than a part of a shell. It is therefore obvious that the Carbon Steel Company, the petitioner, as a manufacturer of steel bars, could not under any circumstances be held to be the manufacturer of a part of a shell.

It must follow, therefore, that the only other theory on which liability for the tax could be imposed upon the Carbon Steel Company was to hold that it was the manufacturer of the completed shell. That it was so considered appears from the opinion of the Circuit Court of Appeals, and from the fact that the tax was laid upon the *entire profit* derived from the whole transaction.

This, we submit, was clear error, because the record shows that the Carbon Steel Company's sub-contractors performed every step in the manufacture of the shell and, therefore, the profit derived by said companies, upon which they paid Munition Manufacturers' Taxes, was a profit from the manufacture of the entire shell. The Carbon Steel Company, in being assessed and paying a tax upon entire profit realized from it in the transaction, was, therefore, necessarily again taxed as a manufacturer of the same shell. The necessary result from this is, that both the Carbon Steel Company and its sub-contractors were taxed as manufacturers of the same shells in their entirety.

It is immaterial that the profit realized by the Carbon Steel Company and its sub-contractors was in different amounts. Under the plain wording of the Act, every company to be taxable must be a manufacturer of a shell or a part thereof. The Carbon Steel Company's sub-contractors did all the manufacturing and, therefore, they must have been the manufacturer of the entire shell.

We submit next that the Carbon Steel Company was not within the plain wording of the Act. The Circuit Court of Appeals apparently admits this, in using the following language (Record, page 136):

"It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company."

It is true that the Carbon Steel Company hired others to do the work. Those others were independent contractors, they were such companies as Westinghouse Machine Company and the Union Switch & Signal Company. They were, as counsel for the Government, stipulated (Record, page 92): "Separate and independent corporations of which neither the capital stock nor business policy were in any manner connected with or controlled by the Carbon Steel Company, its officers, directors or stockholders."

These sub-contractors, under the terms of their several contracts, bore to the Carbon Steel Company only the relationship of independent contractors. The Government held that they were manufacturers of the shells and so assessed them and collected the tax. But the Circuit Court of Appeals now says that the Carbon Steel Company is *also* the manufacturer of those shells because it *either* did the work or hired others to do it.

This interpretation of the Act is, we submit, directly at variance with the decision of this Court in *Gould v. Gould*, 245 U. S. 151, in which Mr. Justice McReynolds uses the following language:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to express matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

To be taxable under the Act, the Carbon Steel Company itself must either have manufactured the shells in question at its own plant or in other plants through its agents or subsidiaries. That the companies which actually did manufacture these shells were not agents of petitioner, but were separate companies acting as independent contractors, is conclusively shown by the wording of their contracts with the Carbon Steel Company, and by the fact that they were assessed and paid their Mmunition Manufacturers' Taxes.

Being neither the manufacturer of a part of a munition or of a completed munition, it must follow therefore that the Carbon Steel Company is not taxable and that the profit derived by it was a dealer's or broker's profit, which is not within the purview of the Act and cannot be included by implication.

In conclusion, we submit it is immaterial whether or not the Carbon Steel Company owned the raw material, as referred to by the Circuit Court of Appeals in its opinion.

The attention of the Court is called to the fact that this is an excise tax, and as such is subject to the rule of construction as laid down by the Court in the case of *Anderson, Collector, v. Forty-Two Broadway Company*, 239 U. S. 69, wherein the Court, in its opinion by Mr. Justice Pitney said, in referring to the attitude of the lower court:

"With these views we cannot agree. There was error as it seems to us in seeking a theoretically ac-

curate definition of 'net income' instead of adopting the meaning which is so clearly defined in the act itself,"

In the Act in question the person taxable is, as defined by the Act, the "person manufacturing projectiles, shells \* \* \*". This, we submit, must mean the person doing the work and not, as the Court of Appeals held, the person owning the raw material.

The status of a manufacturer is determined by the work done, not by the ownership of raw material. A miller manufactures flour, but rarely owns the grain. A tailor, in the sense that he is a manufacturer, often works on the cloth supplied by others, but he is a tailor nevertheless, whether he owns the cloth or not. Webster defines "manufacture" as, "To work raw or partly wrought materials into suitable forms for use." Such is the common understanding of the word, and in such manner, we submit, it should be construed in the Act of September 8, 1916, known as the "Munition Manufacturers' Tax."

We respectfully submit that the Writ of *Certiorari* as prayed for should be granted.

FREDERICK DE C. FAUST,  
H. V. BLAXTER,  
*Attorneys for Petitioner.*

Hon. Alexander King,  
Solicitor General.

You are hereby notified that the enclosed petition for Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit, in the case of Carbon Steel Company v. C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, at No. 2438 March Term, 1919, will be presented to the Supreme Court of the

United States on Monday, October 6, 1919, at the opening of Court on that day.

FREDERICK DEC. FAUST,  
H. V. BLAXTER,

*Attorneys for Petitioner.*

And now, to wit, <sup>Sep 5</sup>August —, 1919, I accept service of the above notice and acknowledge to have received from petitioner's counsel a copy of the petition and brief in this case.

ALEX. C. KING

*Solicitor General.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

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CARBON STEEL COMPANY, PETITIONER,

v.

C. G. LEWELLYN, COLLECTOR.

} No. 535.

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION.**

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The writ of certiorari is sought to review a judgment of the Circuit Court of Appeals affirming one of the District Court denying petitioner the right to recover \$271,062.62, the amount of certain taxes paid by it under protest.

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## STATUTE INVOLVED.

The taxes in question were collected under the provisions of section 301 of the act of Congress approved September 8, 1916 (39 Stat., ch. 463, p. 781), which imposes a tax upon "every person manufacturing \* \* \* shells \* \* \* or any part" of shells, the tax being 12½ per cent upon the net profits received or accrued from the sale or disposition of such articles manufactured within the United States.



**THE FACTS.**

The petitioner is a manufacturing corporation organized under the laws of West Virginia and doing business in the State of Pennsylvania. Its president went to England in search of business. The result was three contracts by which it sold to the British Government a large number of shells to be thereafter manufactured according to specifications furnished and under the inspection of the British Government. The manufacture of these shells proceeded in the following manner: The petitioner manufactured steel in its plant in bar form in what is known as mill lengths and in accordance with the specifications of the British Government. Its own plant was not equipped to fully manufacture shells. It, therefore, made contracts with various other companies to do for it certain portions of the work. Accordingly the steel bars manufactured by it were delivered to the Brown & Zortman Machine Company, of Pittsburgh, Pennsylvania, which company partially sawed, cut, or indented said bars, at points representing the required lengths of shell forgings and redelivered them to the petitioner. The latter then broke or separated the bars into the necessary short lengths, known in the trade as slugs. Petitioner then delivered these slugs to the Westinghouse Machine Company, which company, under contract with the petitioner, converted the slugs by forging them into hollow shell forgings, and annealed or softened them by heat treatment to render them suitable for machining.

By direction of the petitioner, these shell forgings were taken, in approximately equal quantities, by the Westinghouse Machine Company and the Union Switch & Signal Company, which companies, under contract with the petitioner, proceeded to do the work necessary to prepare the shell for delivery, including the lathe work necessary to bring them to exact dimensions, closing in one end of the forgings to form the nose of the shell, drilling out the base of the shell and inserting a base plate, threading the nose of the shell and inserting the necessary bushing, and in the nose bushing a wooden plug to protect the thread thereof, cutting a groove around the circumference of the shell and inserting therein a copper band and turning the band to required dimensions, varnishing, greasing, and crating of the completed shell. In doing this work the two companies last named were supplied by petitioner with wooden plugs to protect the thread in the nose of the shell, with fixing screws, with copper tubing, with the necessary grease, varnish, cement, and other incidentals, all of which were purchased from other companies. In short, all the materials going into the shell were either manufactured or purchased by the petitioner, and all the work of manufacturing the shells from these materials, which at all times belonged to the petitioner, was done either in petitioner's own plant or in the plants of the companies which had contracted with it to do portions of the work.

That the president of the company understood that he was contracting and undertaking to manu-

facture these shells is perfectly plain. In testifying as to what occurred between him and the British authorities at the time he made the first contract, he said:

I told them we were manufacturers of steel but didn't make shells; that I was willing to undertake the manufacture of the steel and to contract with others for the machining and making of the shells.

And again:

I didn't tell them that we were not able to manufacture them. I told them that we would manufacture them. But they understood from me, in our conversation, that we didn't do the machining. We manufactured the steel in our own plant, of course.

#### **BRIEF.**

It is respectfully submitted that the writ should be denied because there are no conflicting decisions to be reconciled and the question presented is not one of such gravity, general importance, or doubt as to require this court to assume jurisdiction.

#### **I.**

There is no claim that a review of the judgment in this case is necessary to reconcile conflicting decisions. It can not be said that the question is one of general importance. It is hardly to be assumed that any other person who may have entered into a contract to manufacture and sell shells will claim that he has not been manufacturing shells within the meaning

of the act. The tax was in effect only during the years 1916 and 1917. The case is one of importance to the petitioner, of course, just as every law suit involving large amounts is important to the litigants. But the question is not one of interest or importance to the general public. The object of creating the Circuit Court of Appeals was to relieve this court of some of its burdens by making the decisions of that court final in just such a case as this unless it appears that the decision is plainly erroneous.

## II.

The bare statement of the facts is itself a complete refutation of the claim that the petitioner was not manufacturing shells. It was a manufacturing company and entered into a contract by which it bound itself to manufacture these shells. In the first contract there was express language that "the contractor agrees to manufacture." The later contracts are replete with provisions regulating the manufacture and imposing upon petitioner the obligation to manufacture the shells. The substance of all the contracts was that the petitioner bound itself to manufacture and sell the stipulated number of shells, the manufacture to be subject to the inspection of the British Government. It is true that the British Government may have known that petitioner did not expect to do all the manufacturing in its own plant. But, taking this fact into consideration, the result simply is that the petitioner contracted to manufacture for the British Government the shells in ques-

tion, with the understanding, existing between the parties, that portions of the work would be let by the petitioner to subcontractors. The petitioner, however, and it alone, bound itself to the British Government to do the manufacturing work, whether it should be done in its own plant, by its own employees, or under subcontracts which the petitioner might see fit to make with other companies. The contracts were plainly manufacturing contracts between the British Government and the petitioner.

What was actually done to accomplish the manufacture contracted for was that the petitioner either manufactured or purchased all the materials necessary, did a part of the work of preparing them and putting them in shape for use and employed other companies to do the machining. From the time that the manufacture began until the shells were ready for delivery, the petitioner was the owner of them and every particle of material in them. The subcontractors did nothing except on the material furnished them by the petitioner, and this work was done under the same British supervision and inspection under which it would have been done if carried on in petitioner's own plant. It was, from beginning to end, the work which petitioner bound itself to the British Government to do. It was petitioner's work, and at least as to results, as completely under its direction as if done by its own force. Petitioner delivered the steel which it manufactured to the company which had contracted to take the next step for the manufacture of the shell. When this step was taken it direc-

ted to whom delivery should be made, and directed the next company as to what further work should be done. In this way it managed and supervised every step of the manufacture. One who does all this would seem to be a manufacturer, whether the different steps were taken in his own plant or whether he found it convenient to send some parts of the work to be done in other plants. In other words, he would seem to be a manufacturer, whether he employed workmen to work under the direction of his own employees or whether he employed some other person or company to furnish the workmen and do the work for him.

Under the facts of this case it is submitted that the petitioner was a manufacturer of these shells in the very strictest sense. But the act does not use the word "manufacture" in any restricted sense. The language is as broad as it could be made. It is not said that persons who themselves take every step or any particular step shall be liable for the tax. It is said that "every person manufacturing" the shells shall pay the tax. The word "manufacturing," as used, is the participle of the verb "to manufacture," and is defined as "engaged or concerned in manufacture." (Murray's New English Dictionary.) Giving it this meaning, a tax is imposed upon every person engaged or concerned in the manufacture of the shells. Surely, the person who has made himself responsible for the manufacture, beginning with the production of the steel itself and ending with the delivery of the finished product, and who either takes every step himself or employs some one to take these

steps for him is engaged in the manufacture of the product. The language used is not technical. It is ordinary, everyday language and easily understood. The meaning seems to be so plain that it can not be made plainer by an elaborate argument.

### III.

The fact that the subcontracting companies may or may not also be liable for a tax on such profit as they derived does not affect the petitioner's liability for the tax on the profits derived by it. The court is now called on to determine whether the petitioner is subject to the tax in question and not whether some other company should or should not pay a tax on the profits made by it as a subcontractor. The Government's view that such subcontractors are liable for a tax on the profits realized from their part of the manufacture has been presented in cases now before the court, but if it was proven that taxes had been unlawfully collected from these subcontractors it would in no way relieve the petitioner of the liability for taxes for which it is plainly liable. It is respectfully submitted that the writ should be denied.

Respectfully submitted.

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

*September, 1919.*

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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1919.

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**No. 535.**

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CARBON STEEL COMPANY, PETITIONER,

v's.

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE FOR  
THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, RE-  
SPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

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**BRIEF ON BEHALF OF PETITIONER.**

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**Statement of Case.**

This case comes into this Court upon a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, and is prosecuted to reverse and set aside the judgment of that Court which affirmed the judgment of the Dis-

trict Court of the United States for the Western District of Pennsylvania.

The original action was one at law, begun by the Carbon Steel Company, petitioner, against C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, respondent, seeking to recover a tax in the amount of \$271,062.62 paid under protest by the Carbon Steel Company to the respondent, upon an assessment made against the Carbon Steel Company under section 301 of title III of the act of September 8, 1916, 39 Stat., 756-780, levying what is known as the Munition Manufacturers' Tax. The District Court entered judgment for the respondent and the judgment was affirmed by the Circuit Court of Appeals.

The section of the act involved reads in part as follows:

"That every person manufacturing \* \* \* shells \* \* \* shall pay for each taxable year, in addition to the Income Tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

The Carbon Steel Company is a corporation of the State of West Virginia, having its plant in the City of Pittsburgh, where it is and has been for many years engaged in the manufacture of commercial steel.

During the year 1915 and about a year before the Munition Manufacturers' Tax act was passed, the Carbon Steel Company entered into three substantially similar contracts with the British Government for the supply of four and one-half inch high-explosive shells. The contracts appear in the record, pages 42 to 55. The British Government at that time knew that the Carbon Steel Company was not equipped for making, and had never, in fact, made shells of any kind. The intention and understanding was that the Carbon Steel Company would make only the steel required for the shells, and that it would procure other companies to do the actual

manufacturing of the shells. This understanding was strictly observed in the performance of all the contracts. The Carbon Steel Company made and supplied suitable steel, in the form of commercial bars, to other independent corporations as subcontractors, who in fact did the actual work of manufacturing of the shells.

The manufacturing subcontractors were the Westinghouse Machine Company and the Union Switch & Signal Company, corporations organized and existing under the laws of the State of Pennsylvania. As shown by the stipulation of fact entered into at the trial of this case (Record, p. 92), these companies were separate and independent corporations. By their contracts entered into with the Carbon Steel Company, the subcontractors agreed to take from the Carbon Steel Company suitable steel, and to thereafter perform every step necessary to produce completed shells. In compliance with the terms of the contracts between the Carbon Steel Company and the British Government, inspectors of the British Government and clerks of the Carbon Steel Company were stationed at the plants where the work was done, and the inspectors of the British Government inspected and approved the work from time to time. The clerks of the Carbon Steel Company simply noted and reported to the Steel Company the progress of the work, and took no part in either the actual doing of the work or in the direction of the same.

The operations necessary to make a shell are these:

1. Obtaining suitable steel in bar form.
2. Cutting or breaking said steel bars to proper length.
3. Converting said steel bars into hollow shell forgings by means of a hydraulic press.
4. The turning of said shells upon a lathe to exact dimensions.
5. Closing in one end of said forging to form the nose of the shell.

6. Drilling out the base of said shell and the insertion of a base plate.

7. Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof.

8. Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to the required dimensions.

9. Varnishing, greasing and crating of the completed shell.

Each of these steps, after the Carbon Steel Company had furnished suitable steel and certain sundries, was performed wholly and exclusively by the manufacturing subcontractors.

The shells upon completion were crated by the manufacturing subcontractors in a manner suitable for overseas transportation, and were thereupon delivered by the Westinghouse Machine Company and the Union Switch & Signal Company at their respective plants to a common carrier for the use of the British Government, the carrier in turn transporting and delivering the shells free alongside steamer at New York.

The Carbon Steel Company thereafter received the agreed price for said shells from the British Government and paid the subcontractors for their work, and in so doing made a net profit of \$2,168,500.96. The Westinghouse Machine Company and the Union Switch & Signal Company were duly assessed and paid a Munition Manufacturers' Tax upon the entire net profits received or accrued from the manufacture of these shells in their entirety (Record, pp. 21-23, p. 93).

Almost a year after the close of the year 1916 the Carbon Steel Company was assessed a tax by the Commissioner of Internal Revenue upon the net profit made by it in the supply of shells to the British Government, as a manufacturer of munitions under the Munition Manufacturers' Tax Act. This

tax was paid under protest and a suit for its recovery was tried upon a stipulation of fact without a jury.

Under this state of facts the District Court and the Circuit Court of Appeals have held that the Carbon Steel Company, in the supply of shells to the British Government, was a manufacturer of munitions as defined in section 301, title III of the act of September 8, 1916, known as the Munition Manufacturers' Tax and as such was properly assessed a tax of  $12\frac{1}{2}$  per cent upon the net profit realized from said transaction, which profit represented the difference between the sums received from the British Government and the cost of raw material and the payments made to the Westinghouse Machine Company, the Union Switch & Signal Company and other companies for doing the work of making the completed shell.

#### **Assignment of Error.**

The Circuit Court of Appeals erred in 1. Entering judgment affirming the judgment of the Court below. (Record page 145) and 2. In holding that under the facts of this case the Carbon Steel Company was a person manufacturing munitions within the meaning of the Munition Manufacturers' Tax Act.

#### **BRIEF.**

##### **Statute Involved.**

Section 301 of title III of the act of September 8, 1916, known as Munition Manufacturers' Tax, 39 Stat., 756-780:

"(1.) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and

appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e) shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: *Provided, however,* That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."

#### **- Question Presented.**

The sole question for determination is whether, under the admitted set of facts embodied in the stipulation in the record, petitioner was a "person manufacturing" completed shells within the meaning of said statute.

#### **Petitioner Did Not in Point of Fact Do Any Manufacturing Upon the Shells in Question.**

1. The original contracts between petitioner and the British Government were negotiated upon the understanding that petitioner would have to procure other companies to do the manufacturing.
2. Other companies procured by petitioner did all the manufacturing work upon the shells in question.
3. The other companies procured by petitioner were not petitioner's agents or servants, but were independent contractors.

### **The Statute Lays an Excise Tax Upon the Manufacturer Alone.**

1. The wording of the statute makes taxable the manufacturer alone and excludes all others.
2. The statute levies an excise tax.  
*Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 429;  
*Knowlton vs. Moore*, 178 U. S., 41, 88;  
*Pacific Insurance Co. vs. Soule*, 7 Wall. (U. S.), 433;
3. The absence of any definition of manufacturing implies its ordinary acceptance.  
*Dewey vs. United States*, 178 U. S., 510.  
*United States vs. Wigglesworth*, 2 Story, 369.
4. The status of a manufacturer is not controlled or affected by the ownership of the raw material from which the manufactured article is made.

### **Revenue Statutes Are to be Strictly Construed.**

1. The provisions of the statutes levying taxes will not be extended by implication.
2. In cases of doubt the construction shall be in favor of the citizen.  
*Gould vs. Gould*, 245 U. S., 151;  
*United States vs. Watts*, 1 Bond, 580.  
*American Net & Twine Co. vs. Worthington*, 141 U. S., 468, 474.  
*Benziger vs. United States*, 192 U. S., 38, 55.

**The Decision of the Circuit Court of Appeals Holding Petitioner Taxable is Error, Because the Undisputed Evidence Shows That Other Corporations Had Already Been Taxed as the Manufacturers of the Same Completed Shells.**

1. The record discloses that prior to the assessment of the tax herein upon petitioner, its manufacturing subcontractors had already been assessed and paid a Mmunition Manufacturers' Tax upon the entire profits derived from making the same shells of which it is now held that petitioner is the manufacturer.

2. The Circuit Court of Appeals erred in its method of interpretation of the statute and made no distinction as to whether petitioner itself did manufacturing or procured other companies to do it.

**ARGUMENT.**

**I.**

**Petitioner Did Not in Point of Fact Do Any Manufacturing Upon the Shells in Question.**

The facts in the case are simple, definite, and undisputed.

Petitioner is a West Virginia corporation, engaged in the making of commercial steel—it has never made nor was it equipped to make shells. As a result of business being very bad in the fall of 1914, the president of petitioner went to Europe, to use his own language, "to see if I could procure some orders from the English or French Governments." (Testimony, Chas. McKnight, Record, p. 25.)

The understanding had with the British Government appears in the testimony of petitioner's president (Record, p. 26):

"A. I told them that we were manufacturers of steel but didn't make shells, that I was willing to undertake the manufacture of the steel and to contract with others for the machining and making of the shells."



As a result of that trip, petitioner obtained three contracts from the British Government, the first more in the nature of a trial order (Record, p. 42), the second covering 425,000 shells (Record, p. 45), and the third for 15,000 shells (Record, p. 52).

Under these contracts, petitioner supplied to the British Government over half a million 4½" high explosive shells, complete, except for explosive charge and detonating device. All the facts concerned with the carrying out of these contracts were so definite and clear that at the trial of the case they were embodied in a stipulation (Record, p. 84).

From that stipulation it will be seen that to make a shell of the kind herein involved it is necessary to go through nine principal steps, of which the first is to obtain raw material.

This first step petitioner performed—that is, it made suitable steel in its plant in the form of commercial bars of random lengths.

It then entered into contracts with the Westinghouse Machine Company and the Union Switch & Signal Company whereby these companies performed all the manufacturing steps. The necessity of engaging two principal subcontractors was due to the fact that petitioner undertook to supply the British Government with more shells than one subcontractor would undertake to make.

Petitioner, as it made the steel, turned it over to the Westinghouse Machine Company and the Union Switch & Signal Company, who thereupon proceeded to do the actual work of manufacturing the shells by performing the following steps:

Cutting or breaking said steel bars to proper length.

Converting said steel bars into hollow shell forgings by means of a hydraulic press.

Turning of said shells upon a lathe to exact dimensions.

Closing in one end of said forging to form the nose of the shell.

Drilling out the base of said shell and the insertion of a base plate.

Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof.

Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to the required dimensions.

Varnishing, greasing and crating of the completed shell.

Loading the shells in railroad cars at their respective plants for transportation to New York.

Upon arrival in New York, the British Government received the shells and paid the petitioner the agreed price therefor. The petitioner in turn paid the subcontractors. The difference between the amount received from the British Government and the amount paid to the subcontractors, less its expenses for raw material and sundries, represented the profit made by the petitioner. It was upon this profit that the Government levied a Mmunition Manufacturers' Tax, the recovery of which is the subject of this suit.

From these facts we submit that petitioner did not in point of fact do any *manufacturing*. It made steel bars, but steel bars are admittedly not shells or parts of shells. Petitioner retained title to this raw material, but the subcontractors performed all the steps necessary to manufacture the completed shell, including even crating for export and loading in railroad cars.

The contracts under which the subcontractors thus manufactured the shells in question are found in the record, pages 57 to 77. An examination of these contracts shows that the Westinghouse Machine Company and the Union Switch &

Signal Company undertook to manufacture shells which would comply with the British specifications, and to make these companies responsible for carrying out the terms of petitioner's contracts with the British Government, approved copies were incorporated in the subcontractor's contracts. For example, on page 62 of the record, setting forth petitioner's contract with the Westinghouse Machine Company, the following recital is found:

"That whereas, The Steel Company has entered into a contract with His Britannic Majesty's Government under date of September 29, 1915, for the supply of 4.5" high explosive shells, as per approved and final copy of contract including specifications and drawings attached hereto and made a part hereof as fully as if recited herein, the provisions of which shall apply in all respects between the parties hereto except where specifically modified hereby."

Petitioner retained no control of any kind over the methods to be pursued by the subcontractors in manufacturing the shells. It retained only the right to have its own inspectors and those of the British Government present in the subcontractor's works at all times. Petitioner's inspectors were mere clerks, or tellers, as shown by the testimony of Charles McKnight, petitioner's president (Record, p. 27), as follows:

"Q. Will you state whether or not the Carbon Steel Company had inspectors at the plants of the Westinghouse Machine Company and the Union Switch & Signal Company during the progress of the work?"

"A. They didn't have inspectors, but they had clerks who kept account of the shells shipped each day.

"Q. Did those clerks do anything other than keep a record of the production for you?"

"A. No, sir."

The best test of petitioner's relationship to its subcontractors as determined by its contracts was that, in case of the subcontractor's default petitioner had merely the right to

cancel, procure other subcontractors, and bring its action for damages.

These provisions are absolutely inconsistent with petitioner's status had its subcontractors been servants or general agents, for in such case petitioner manifestly would not have reserved a right to cancel and bring its action for damages, because it would have had its right to control.

We therefore submit that petitioner in point of fact did not manufacture the shells in question, either itself or through its servants or general agents, but that on the contrary the shells were manufactured by the Westinghouse Machine Company and the Union Switch and Signal Company, and that these companies were independent contractors.

## II.

### **The Statute Lays an Excise Tax Upon the Manufacturer Alone.**

The next step is the application of these facts to the statute involved to ascertain if the wording of the statute which bears the title of "Munition Manufacturers' Tax" extends to a case where the person taxed has not in point of fact done any manufacturing either itself or through its servants or general agents.

The statute in question is section 301 of title III of the general revenue act of September 8, 1916, the wording of which so far as it affects petitioner herein, is:

"Sect. 301. That every person manufacturing \* \* \* shells \* \* \* shall pay for each taxable year \* \* \* an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

Simpler wording could not have been devised to make clear the two essentials of the section, first, that the person to be taxed must have manufactured the munition named, and, second, must have derived a profit from its sale or disposition.

In structure the statute lays an excise tax, and in point of fact the tax is so designated in the statute itself. As an excise tax under the settled rule of construction, this court is not concerned with whether it operates uniformly.

*Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 429.

*Knowlton vs. Moore*, 178 U. S., 41.

*Pacific Insurance Co. vs. Soule*, 7 Wall., 433.

By the very use of the word "manufacturing," Congress has, we submit, singled out for taxation persons of this category as distinguished from persons of every other category, who, in commercial life, bear a relationship to the munition business. The buyer or seller is not taxable, nor the dealer or broker.

Unlike other excise taxes laid by Congress upon the manufacturer, buyer, seller or consumer of commodities, this statute contains no definition of the word "manufacturing." "Persons" are carefully defined to include partnerships, corporations and associations, but "every person manufacturing" stands alone without explanation or definition.

In the excise taxes heretofore laid by Congress, wherein the manufacturers of commodities have been made the subject of taxation, there is usually found careful and often sweeping definitions.

In the statute of August 27, 1894, taxing manufacturers of playing cards, 28 Stat., 562, the manufacturer is defined to be—

"Every person who offers or exposes for sale playing cards, whether the articles so offered or exposed are of foreign manufacture and imported, or are of

domestic manufacture, shall be deemed the manufacturer thereof."

In the statute approved August 2, 1886, amended May 9, 1902, 24 Stat., 209; 32 Stat., 194, a manufacturer of oleomargarine is defined as follows:

"Any person that sells, vends or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act and subject to the provisions thereof."

The Court will notice that in these statutes Congress defines manufacturers in such a way as to include dealers, brokers, and mere occasional vendors.

It seems to us that it must be assumed that Congress, not having given any definition to the word, "manufacturing" it must therefore be taken in its strict but usual sense.

*Pollock vs. United States*, 178 U. S., 510.

Mr. Justice Story in the case of *United States vs. Wigglesworth*, 2 Story, 369, referring to Revenue Laws, speaks of them as laws—

"which are designed to operate upon the public at large and are supposed to use words in the senses belonging to the familiar language of common life and commercial business."

In the case of *United States vs. Goldenberg*, 168 U. S., 95, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar."

We therefore submit that the words "every person manufacturing" means every person who manufactures in the sense the words are commonly understood.

*Webster's New International Dictionary* contains the following definitions:

"Manufacture, *v. t.* 1. To make (wares or other products) by hand, by machinery, or by other agency; as, to manufacture cloth, nails, glass, etc.: to produce by labor, *esp.*, now, according to an organized plan and with division of labor, and usually with machinery.

2. To work, as raw or partly wrought materials, into suitable forms for use; as to manufacture wool, iron, etc.

3. To fabricate; to invent; also to produce mechanically."

"Manufacturer, *n.* One who manufactures. An employer of operatives in manufacturing."

*New Century Dictionary and Cyclopedia:*

"Manufacture, *v. trans.* 1. To make or fabricate, as anything for use, especially in considerable quantities or numbers, or by the aid of many hands or of machinery: work materials into the form of."

"Manufacturer, *n.* One who manufactures; one who is engaged in the business of manufacturing."

"Manufacturing (verbal *n.* of manufacturer, *v.*). The act or process of making articles for use."

If our position be sound it must follow that the persons taxable under the statute in question are those only who do manufacturing themselves or through their servants or general agents, not those who procure others to do it as brokers, dealers, middlemen or factors.

Considerable stress has been laid by counsel for the respondent throughout this litigation upon the fact that the petitioner owned the raw material from which the shells in

question were made, and that the ownership of this raw material necessarily made petitioner the manufacturer.

Ownership of raw material is not, we submit, a test, because the underlying conception of manufacturing is the work done. Nothing can be manufactured without the application of skill or labor by hand or machinery, and the application of that skill or labor produces the manufactured article without reference to ownership or title of the raw material. The miller in an exact sense is a manufacturer of flour whether he *owns* the grain or not. Should anyone employ a miller to make flour from grain owned by the employer, whether that employer becomes the manufacturer depends not on the ownership of the grain, but on the relationship established by the contract of employment. If that individual miller is a servant or general agent, the employer is the manufacturer, but if the individual miller is an independent contractor, responsible to his employer for the result, not the method, then the miller is the manufacturer, not the employer.

We therefore submit that "every person manufacturing" as used in the statute means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked upon does not alter this meaning of the word.

## II.

### Revenue Statutes Are to be Strictly Construed.

In addition to the rules of construction of excise taxes referred to above, the tax in question comes within the class for which this Court, in the case of *Gould vs. Gould*, 245 U. S., 151, Mr. Justice McReynolds speaking for the Court laid down a rule of interpretation as follows:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language



used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen."

In the case of *United States vs. Wigglesworth*, 2 Story, 369, Mr. Justice Story, in stating the reasons for his conclusion, uses this language:

"In the first place it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government and in favor of the subjects or citizens because burthens are not to be imposed nor presumed to be imposed beyond what the statute expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy and therefore are not to be liberally construed."

In the *United States vs. Watts*, 1 Bond, 580, it is said:

"It is the duty of the courts of the Union undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the Government, fairly to enforce the revenue laws of the country and see that they are not fraudulently evaded. But they are not at liberty by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law.

It belongs exclusively to the legislative department of the Government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected. And however expedient it may seem, under certain circumstances to invade the proper domain of legislation by judicial construction, it is clearly in conflict with the theory of government."

This principle of the construction of Revenue Laws is stated with great force and clearness in the English case of *Parlington vs. Attorney General*, L. R., 4 H. L., 100; 21 L. T. Rep., N. S., 370. It is there said:

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

To the same effect are:

*American Net & Twine Co. vs. Worthington*, 141 U. S. 468.

*Benziger vs. United States*, 192 U. S. 38, 55.

### III.

**The Decision of the Circuit Court of Appeals Holding Petitioner Taxable is Error. The Unidsputed Evidence shows That Other Corporations Had Already Been Taxed as the Manufacturer of the Same Completed Shells.**

It appears in the stipulation that each subcontractor was—

"A separate and independent corporation of which neither the capital stock nor business policy was in any manner connected with or controlled by plaintiff (petitioner), its officers, directors or stockholders, nor was said Westinghouse Machine Company (or Union Switch & Signal Company) a subsidiary of plaintiff (petitioner). (Record, p. 92.)"

However, the matter did not end here, for after manufacturing the shells in question the Westinghouse Machine Company and the Union Switch & Signal Company were assessed and paid their Munition Manufacturers' Taxes upon all profits realized from the manufacture of the very same shells of which the Government now is contending petitioner is also the manufacturer.

Counsel for respondent in the court below argued that this was irrelevant and immaterial, but the particular attention of the court is called to the fact that in the 15th stipulation, appearing on page 93, it is set forth that the Westinghouse Machine Company and the Union Switch & Signal Company were *duly* assessed and paid a Munition Manufacturers' Tax for the year 1916 upon the net profits realized from the manufacture of munitions, as defined by said act. And the testimony, Record, p. 21 to 24, shows that the taxes so paid by the subcontractors were computed upon all profits derived under their contracts with petitioner herein, covering the shells in question.

We have thus a self-evident impossibility, viz., that petitioner and its subcontractors, which were stipulated to be independent corporations, can both be the manufacturer of the same shells in their entirety. That is, petitioner has been taxed upon the *theory* that it has performed all the manufacturing necessary to complete the shells, and the Westinghouse Machine Company and the Union Switch & Signal Company have been taxed for actually performing all the manufacturing necessary to complete the same shells.

Nor is this situation altered because petitioner and its subcontractors made profits in different amounts and hence their respective taxes, being based upon profits, varied in amount. It is entirely conceivable that two companies can make a different profit in doing the same work, but it is inconceivable that two separate companies can in point of fact both manufacture the same article.

This situation we submit proves that the decision of the court below was palpable error.

An analysis of that decision shows that the Court first endeavored to put itself in the position of Congress so as "best to construe and apply what was done." (Record, p. 131). That endeavor led to the Court finding that in addition to the feeling that war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led Congress to pass the Statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents, and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. (Record, p. 131).

The Court below then applies what it terms the "broad, inclusive terms of the statute, 'every person manufacturing shells,'" along the lines it indicated as set forth above, and finds that petitioner herein manufactured the shells. The reasoning given is this (Record, p. 136):

"It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was *either* done by the Carbon Steel Company itself *or* by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company." (Italics our own.)

We respectfully submit that this reasoning is fallacious. The evidence shows that petitioner did not do the manufacturing—it did hire others, but petitioner is not the manufacturer merely because, as the Court below holds, the manufacturing was *either* done by the Carbon Steel Company *or* by those whom it hired to do it.

Those hired to do it—the Westinghouse Machine Company and the Union Switch & Signal Company—were independent contractors, separate corporations, and not agents or subsidiaries.

This same error in reasoning on the part of the Court below appears again later in the opinion wherein it is said (Record, p. 137) :

"We therefore conclude that by virtue of the Steel Company's (petitioner's) own work in the first step and by virtue of its effecting and controlling the other eight steps through its subagents, the Steel Company was manufacturing shells, and therefore subject to the tax imposed by this statute."

The question naturally arises that if petitioner was not the manufacturer of the shells in question, what was it?

Our answer is that petitioner was a dealer.

The Supreme Court of Pennsylvania has aptly described a dealer as "Not one who buys to keep or makes to sell, but one who buys to sell again."

Norris Bros. *vs.* Commonwealth, 27 Pa. Supreme Ct. 494.

Of course, the exact situation of petitioner in reference to the shells in question does not find a ready parallel in commercial dealings because the situation was the outgrowth of unusual circumstances.

The steel business was very bad. Petitioner, as its President frankly states, was losing money—and it became evident that it was necessary to get business in some way (Record, p. 25).

England in 1914 didn't want steel—the only thing petitioner could make—it wanted shells—how badly everyone knows. An understanding was reached that petitioner would make the steel (if it could) and get others to make the shells (if it could).

We have no doubt that if petitioner could not have procured other Companies to manufacture shells, it would have put in the machinery and equipment and made the shells itself, or if it could not have made the steel itself it would have bought it from others.

Petitioner had undertaken to supply shells and that it had to do.

Later in the war, of course, many companies and individuals procured contracts and probably resold them or bought the articles required in the open market and supplied them to the Allies, but in the fall of 1914, there were probably few companies in the United States that had ever made a modern high explosive shell.

It, therefore, seems to us that petitioner was under the facts a dealer or perhaps what might be called a contractor.

It must be remembered that the statute in question was not passed until two years later, and we think it can be assumed that Congress by that time was familiar with the size and growth of the munition business in the United States, and the various ways in which it was carried on.

We, therefore, submit that for petitioner herein to be taxable the statute should either have covered in explicit language "every person manufacturing or procuring the manufacture of shells" or else should have contained as has been customary, a definition of manufacturing broad enough to cover also the broker, dealer and factor.

We, therefore, submit that petitioner under the facts in the Record was not a person manufacturing shells within the meaning of Sec. 301, Title III, of the act of September 8, 1916, and that the judgment of the Court below should therefore be reversed.

H. V. BLAXTER,  
FREDERICK DeC. FAUST,  
HENRY O'NEILL,

*Attorney for Petitioner.*

FAUST AND WILSON,  
*Of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

CARBON STEEL COMPANY, PETITIONER,

v.

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

No. 535.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR THE RESPONDENT.

The petitioner sued to recover \$271,062.62 paid under protest as an excise tax assessed under section 301 of Title III of the act of September 8, 1916 (39 Stat., c. 463, pp. 756, 780).

## JUDGMENT BELOW.

This case was tried before the District Judge without a jury and resulted in a judgment denying the relief sought, and this judgment was affirmed by the Circuit Court of Appeals.

## STATUTE INVOLVED.

The taxes in question are assessed under section 301 of the act above cited, which is as follows:

SEC. 301. (1) That every person manufacturing (a) gunpowder \* \* \*; (b) cartridges \* \* \*; (c) projectiles, shells, or torpedoes of

any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms \* \* \*; (e) electric motor boats \* \* \*; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e), shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: \* \* \*.

#### THE FACTS.

The petitioner is a manufacturing corporation organized under the laws of West Virginia and doing business in the State of Pennsylvania. In 1914 its president went to England in search of business growing out of the European war. The result was one contract followed by two others, under which it furnished to the British Government the shells in question. Its first contract was in the form of an agreement signed January 26, 1915, by the proper officials of the British Government and by the petitioner through its president. This contract styled the petitioner "the contractor" and recited that "the contractor agrees to manufacture" 75,000 shells in accordance with the specifications and drawings supplied. The next contract was dated September 29, 1915, and signed on behalf of the British Government by J. P. Morgan & Co., as agents. It called for 425,000 shells. This con-



tract styles the British Government "the buyer" and the petitioner "the seller."

It then recites that the buyer has contracted to purchase from the seller and the seller has contracted to sell to the buyer the number of shells mentioned at the price and subject to the terms and conditions stated in the contract. The shells thus sold not then being in existence, the contract proceeds with numerous provisions as to their manufacture by the seller. There are references to, (1) the petitioner's "being able to manufacture from its present plants more than 425,000 of said shells before June 30, 1916"; (2) "all shells in excess of said 425,000 shells which the seller may manufacture"; (3) to the right to have inspectors "at each of the factories where the shells hereby contracted for and their component parts are being manufactured"; (4) protecting the seller against delays due to strikes, floods, fires, explosions, riots, etc., and various other provisions looking to the manufacture of the shells called for. The president of petitioner, testifying as a witness and speaking of the negotiations which led up to this contract, said:

They asked me if I had made shells and I told them we had not, but that we could, I was positive, and were willing to make a trial. (Rec., p. 25).

And again:

And there I consummated this contract with the British Government for 4½-inch howitzer shells, with the understanding with them that, if we were able to make 4½-inch

shells, 75,000 on the first order, they would give us what they called a following contract. (Rec., p. 25).

And again:

I told them that we were manufacturers of steel, but didn't make shells; that I was willing to undertake the manufacture of the steel and to contract with others for the machining and making of the shells. (Rec., p. 26).

And still again:

I didn't tell them that we were not able to manufacture them. I told them that we would manufacture them. But they understood from me, in our conversation that we didn't do the machining. We manufactured the steel in our own plant, of course. (Rec., p. 29).

Immediately upon the return of its president petitioner began to manufacture under the contract. The manufacture proceeded in the following manner: Petitioner manufactured steel in its plant in bar form in what is known as mill lengths—that is, such lengths as the various ingots roll out to when reduced to a bar of the required diameter. Its plant was not fully equipped to manufacture shells. It therefore made contracts with various other companies to do for it certain portions of the work. Accordingly, the steel bars manufactured by it were delivered to the Brown & Zortman Machine Company, of Pittsburgh, Pa., which company partially sawed, cut or indented said bars at points representing the required lengths of shell forgings, and redelivered

them to the petitioner. The latter then broke or separated the bars into the necessary short lengths required for shell forgings. Petitioner then delivered these short lengths to the Westinghouse Machine Company, which company, under contract with petitioner, converted them, by forging, into hollow shell forgings and annealed or softened them by heat treatment to render them suitable for machining. By direction of the petitioner, these forgings were delivered, in approximately equal quantities, to the Westinghouse Machine Company and the Union Switch & Signal Company, which companies, under contracts with the petitioner, proceeded to do the work necessary to prepare the shells for delivery, including the lathe work necessary to bring them to the exact dimensions, closing in one end of the forging to form the nose of the shell, drilling out the base of the shell and inserting a base plate, threading the nose of the shell and inserting the necessary bushing, and placing in the nose bushing a wooden plug to protect the thread thereof, cutting a groove around the circumference of the shell and inserting therein a copper band and turning the band to required dimensions, varnishing, greasing, and crating of the completed shells. In doing this work the two companies last named were supplied by petitioner with wooden plugs, with fixing screws, with copper tubing, with the necessary grease, varnish, cement, and other incidentals, all of which were purchased from other companies. In short, all the materials going into the shells were either manu-

factured or purchased by the petitioner, and all the work of manufacturing the shells from these materials, which at all times belonged to the petitioner, was done either in petitioner's own plant or in the plants of companies which had contracted with it to do portions of the work.

#### **QUESTION INVOLVED.**

The taxes assessed were paid under protest and the necessary steps taken to entitle petitioner to recover if, in fact, it was not liable. The profits on which the tax was assessed were those derived by the petitioner from the manufacture and sale of the shells above mentioned. The question is whether the petitioner was a person manufacturing such shells within the meaning of the act above quoted.

The contention of the petitioner is that it was not engaged in manufacturing shells, but was a mere dealer or broker, and was not therefore subject to the tax.

The contention of the Government is that it contracted to manufacture the shells and was engaged in their manufacture within the meaning of the act, and was, therefore, liable for the tax collected.

#### **ARGUMENT.**

No question is raised as to the validity of the assessment made by the Government officials if the petitioner was liable for a tax. On the other hand, as stated above, it is conceded that all steps necessary to enable the petitioner to recover, if it was not liable, have been taken. The shells were manufactured in

the United States, and petitioner derived a profit from their sale. By the express terms of the act the Government was entitled to collect a tax from "every person manufacturing" them, based upon the amount of profit derived as a result of their sale.

**PETITIONER'S CONTRACTS WERE TO MANUFACTURE SHELLS FOR THE BRITISH GOVERNMENT.**

From the statement of facts above set out it is obvious that the petitioner, a manufacturing company, entered into a contract by which it bound itself to manufacture these shells. In the first contract there was express language that "the contractor agrees to manufacture" 75,000 shells, and the petitioner was styled "the contractor." In the later contracts it is styled "the selier," and it contracts to sell the number of shells mentioned in each contract. But the contracts show on their face that this agreement to sell was an agreement not to sell shells already manufactured, but to sell them when thereafter manufactured. And, as shown above, the contracts are replete with provisions regulating the manufacture and imposing the obligation upon petitioner to manufacture them. In other words, the substance of all of the contracts was that the petitioner bound itself to manufacture *according to specifications* and sell the stipulated number of shells. It is true that the proof shows that the British Government knew at the time that petitioner did not expect to do all the manufacturing work in its own plants. But, taking this fact into consideration, the result simply is that the petitioner contracted to manufacture for the British Government

the shells in question, with the understanding, existing between the parties, that portions of the work would be let by the petitioner to subcontractors. The petitioner, however, and it alone, bound itself to the British Government to do the manufacturing work, whether it should be done in its own plants by its own employees or under subcontracts which the petitioner might see fit to make with other companies. The contracts were, at last, plainly manufacturing contracts between the British Government and the petitioner alone.

**PETITIONER WAS ENGAGED IN MANUFACTURING SHELLS  
WITHIN THE MEANING OF THE ACT.**

The petitioner having thus bound itself by contract to manufacture these shells, the next question is whether it was, in fact, engaged in manufacturing the shells which it afterwards delivered in satisfaction of its contracts. The articles contracted for were not such as are kept in stock or could be bought in the markets. They had to be manufactured. But few, if any, companies were then conducting all the manufacturing processes necessary to produce shells. What was actually done was that petitioner either manufactured or purchased all the materials necessary, and employed other companies to conduct the various manufacturing processes. From the time that the manufacture began until the shells were ready for delivery, the petitioner was the owner of them and every particle of material in them. The subcontractors furnished nothing except labor and factory equipment. They did nothing except to

work on materials furnished them by the petitioner, and this work was done as directed by petitioner and under the same British supervision and inspection under which it would have been done if carried on in petitioner's own plant. It was, from the beginning to the end, the work which petitioner had bound itself to the British Government to do. It was petitioner's work, and, at least as to results, as completely under its direction as if done by its own force. This plan, by which one manufacturer, who finds his equipment overcrowded or unsuited for the manufacture of a particular article which he has undertaken to produce, engages another manufacturer to do the work for him, is nothing unusual in the manufacturing world.

In this case, petitioner delivered the steel which it had manufactured and devoted to the purpose of carrying out its contracts by breaking into suitable lengths, to the company which had contracted to take the next step in the manufacture of the shells. When this step was taken, it directed where and to whom delivery should be made, and directed the next company as to what further work should be done. In this way it managed and supervised every step of the manufacture as completely as if the work had been done in its own factory. One who does all this would seem to be a manufacturer, whether the different steps were taken in its own plant or whether it found it convenient to send some parts of the work out to other companies to be done in their plants.

In other words, he would seem to be a manufacturer whether he employed workmen to work under the direction of himself or of his own employees, or whether he employed some other person or company to furnish the plant and workmen and do the work for him. Under the facts of this case, it is submitted that the petitioner was a manufacturer of these shells in the very strictest sense. But the act does not use the word "manufacture" in any restricted sense. The language is about as broad as it could be made. The act does not say that only persons who themselves take every step or any particular step in the manufacture shall be liable for the tax. It says that "every person manufacturing" the shells shall pay the tax. The word "manufacturing" as used is the participle of the verb "to manufacture," and is defined as "engaged or concerned in manufacture." Murray's New English Dictionary. Giving it this meaning, the tax is imposed on every person engaged or concerned in the manufacture of shells. Surely, the person who has made himself responsible for the manufacture and who, beginning with the production of the steel itself and ending with the delivery of the finished product, manages, controls, and directs every step in the manufacture and who does all the work himself or employs some one to do it for him is both engaged and concerned in the manufacture. The language used is not technical. It is ordinary, everyday language, and easily understood. The meaning seems to be so plain that it can not be made plainer by elaboration.



**THE FACT THAT THE SUBCONTRACTING COMPANIES MAY ALSO BE LIABLE FOR A TAX ON SUCH PROFIT AS THEY DERIVE DOES NOT AFFECT THE PETITIONER'S LIABILITY FOR THE TAX ON THE PROFITS DERIVED BY IT.**

It appears that at least some of the companies which were subcontractors on this work paid the tax on the profits which accrued to them. Whether these taxes were properly or improperly collected is wholly beside the present case. The court is now called on to determine whether the petitioner is subject to the tax in question and not whether some other company should or should not pay a tax on the profits made by it as a subcontractor. If some other company has paid a tax for which it was not liable that would be no reason for relieving this petitioner of a tax for which it is liable. Moreover, the tax which petitioner paid did not include a tax on profits made by any of its subcontractors. In deducting from the selling price the cost of production, in order to arrive at its net profits, it, of course, deducted the full amount which it had paid to each and all of its subcontractors. If the amounts so paid included, as they doubtless did, profits to subcontractors, the question of whether those profits are subject to tax under the act in question is one wholly between the Government and the subcontractor. The only difference between these subcontractors and those from whom the Government is insisting, in causes numbered 525 and 526 on the docket of this court, on the right to collect taxes is that in those causes the subcontractors furnished the material and conducted the first stages of manufacture, while in

this case the petitioner furnished all the materials and the subcontractors merely conducted the manufacturing processes. Whether this difference is material in determining whether the subcontractors in the present case are liable for the tax need not now be determined. The point is that the petitioner has paid taxes only on the profits which it derived, after paying the full amounts which it paid to its subcontractors. If the latter are also liable for a tax on the profits realized by them, the result simply is that the Government has collected, as the act of Congress directed, a tax on the profits derived by every person engaged in the manufacture of these shells.

CONCLUSION.

In conclusion, it is respectfully submitted that there is no error in the judgment of the Circuit Court of Appeals affirming that of the District Court and it should be affirmed.

Respectfully,

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*Assistant Attorney General.*

DECEMBER, 1919.

